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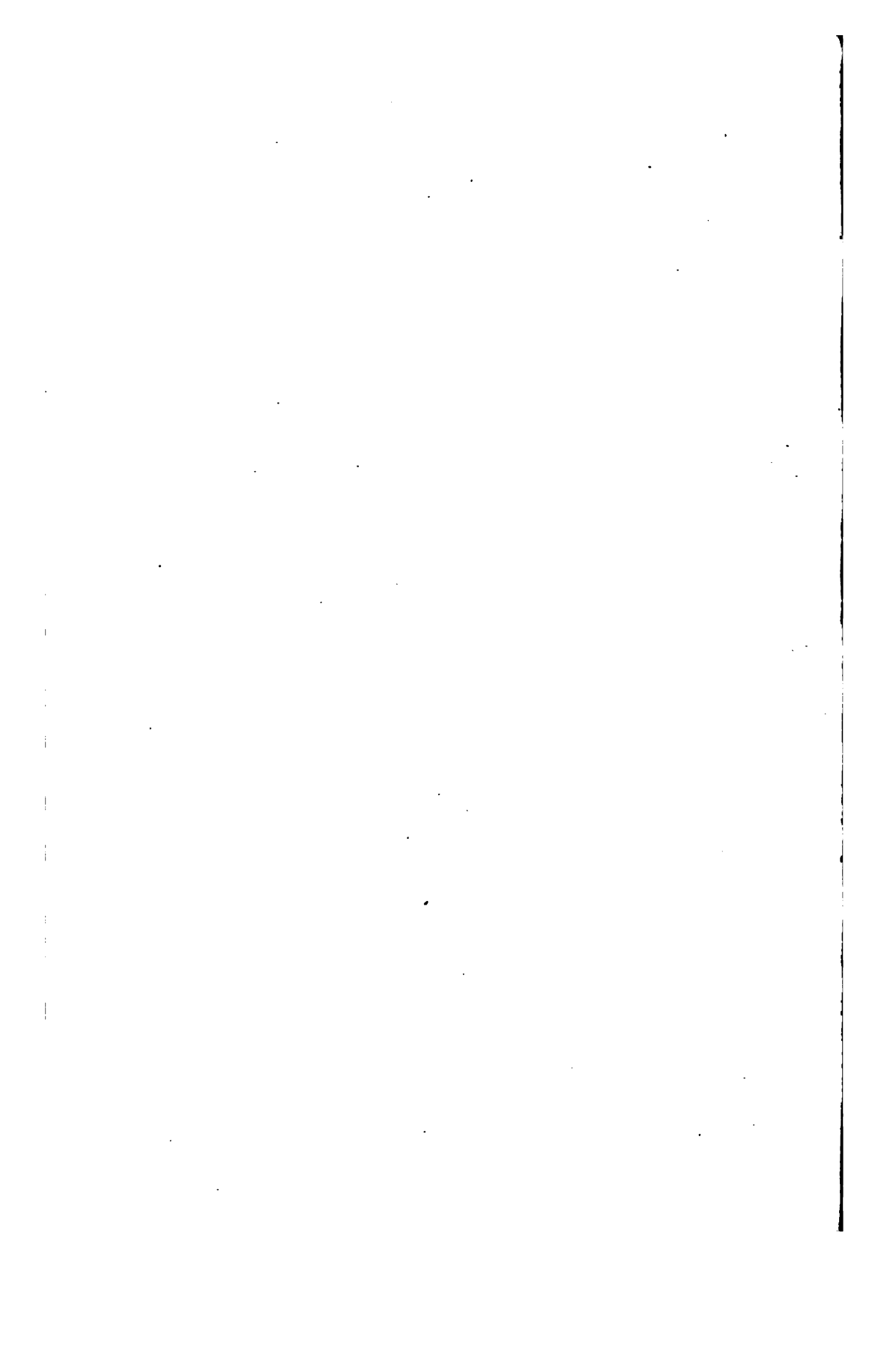
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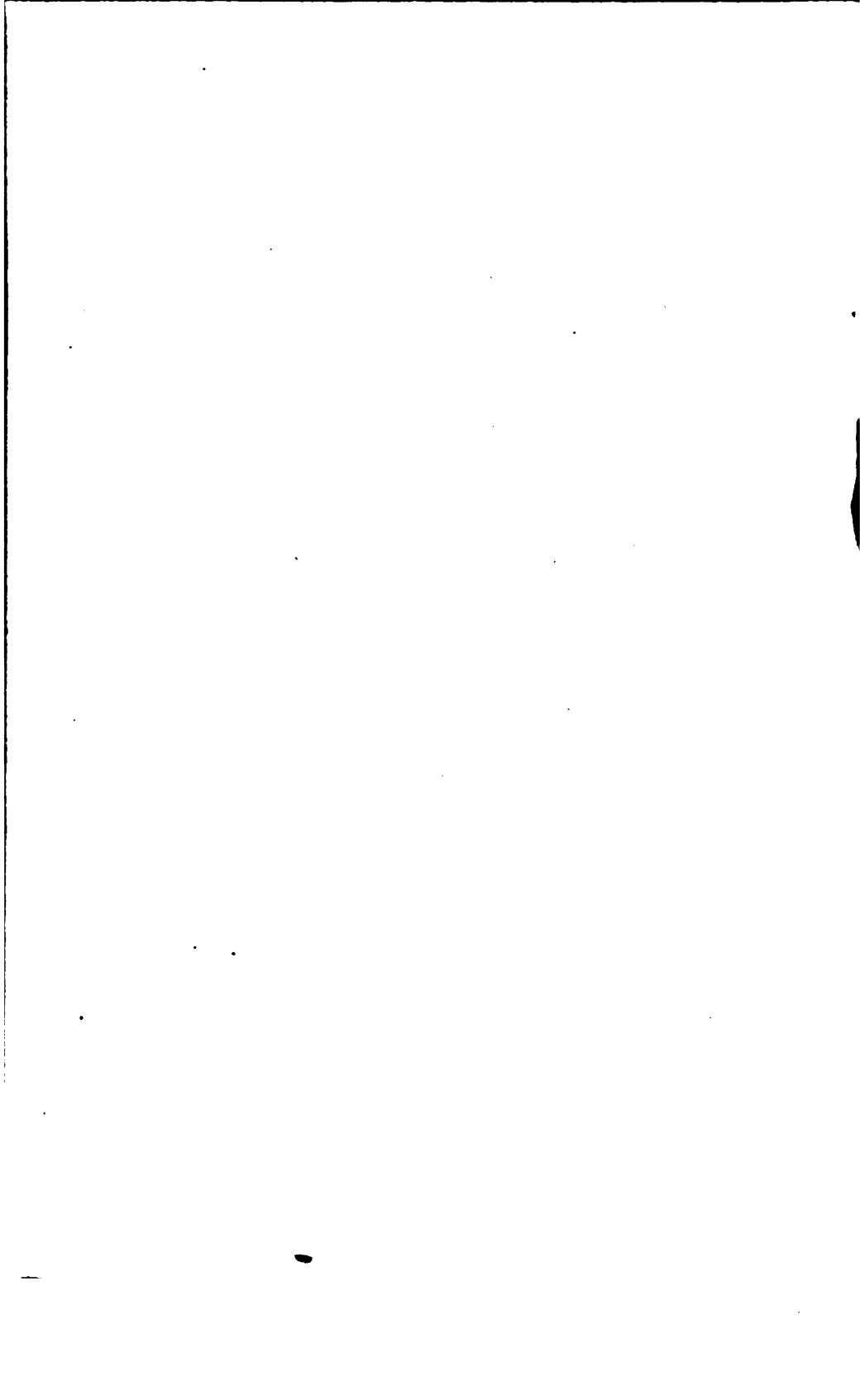


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CASES

DECIDED IN

64. 7th. 1st. 1825.

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND,

1825.

REPORTED BY

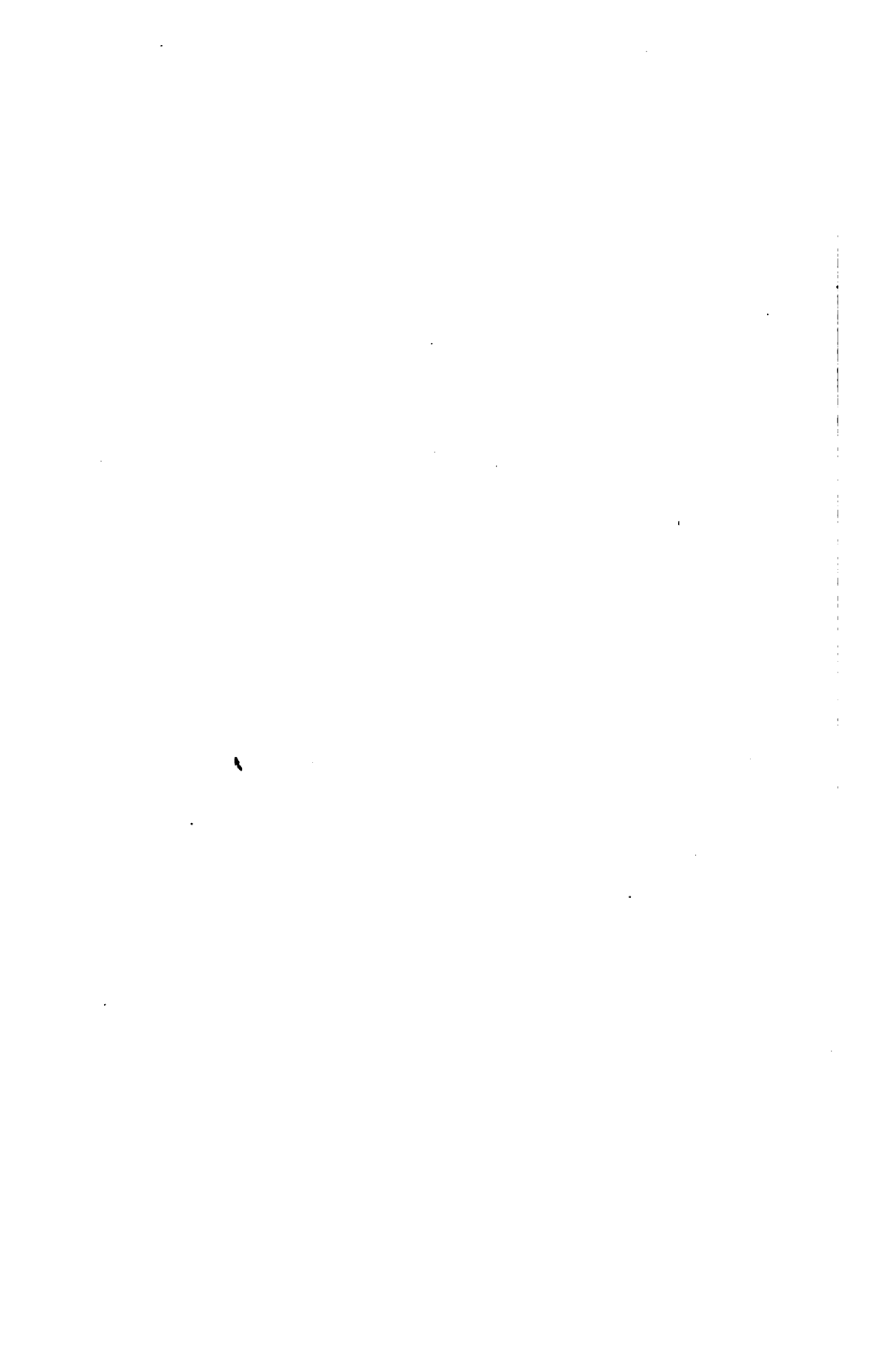
JAMES WILSON AND PATRICK SHAW, ESQUIRES,
ADVOCATES.

VOLUME I.

WILLIAM BLACKWOOD, EDINBURGH;

T. CADELL, AND M. STEVENS AND SONS, BELL-YARD,
LINCOLN'S INN, LONDON.

MDCCCXXIX.



CASES

DECIDED IN

6th April 1825

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND,

1825.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, ESQUIRES,
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MDCCCXXIX.

Feb. 10. 1825. factor appointed, who complained to the Sheriff, and prayed to have it found, 'that Mr Waldie has no right to carry off ' gravel from the bed of the river contiguous to the lands of ' Roxburghe, or to deepen the channel of the stream betwixt the ' said lands and the anna, nor to erect or build any dam-dyke ' across the river Tweed: and in the mean time to interdict and ' prohibit him from any of these operations.' An interim interdict was issued; and after a litigation, and the process had been brought into the Court of Session, Mr Waldie was perpetually interdicted from deepening the channel of the northern branch of the river opposite Quarryholes, and ordained to remove the subaqueous dam-dyke or cauld.

During the dependence of this litigation, Mr Waldie's servants having completed the dam-dyke in contempt of the interim interdict, the Court of Session found the same is 'to be held to ' have been done with the knowledge and approbation of the defender Mr Waldie;' found him liable in damages, ordained him to remove the dyke, and to pay a fine for the breach of interdict.

In 1813 it was alleged by the judicial factor that Mr Waldie's servants had again begun to deepen the north channel at the prohibited place, and that a complaint was only dropped in consequence of Mr Waldie's assurances that matters should be forthwith restored to their former state. But in 1817, when Mr Waldie was in England, several persons, servants or dependants of Mr Waldie, came by night, furnished with shovels and other instruments, and proceeded to deepen the north channel at the interdicted place. Among these individuals was one Cockburn, (Mr Waldie's gardener), who had been engaged in the former breach of interdict.

Of this violation of the interdict the Duke (who had now succeeded to the estate) complained to the Sheriff, and prayed him to ordain Waldie to restore the channel, so far as it has been altered, to its former state; and to prohibit and discharge Waldie, by himself, his servants, or others in his employment, or acting under authority derived from him, from farther violating the interdict of the Supreme Court, and that under a penalty, with expenses.

A proof having been allowed, the Sheriff found the complaint proved; prohibited and discharged Mr Waldie, by himself, his servants, or others in his employ, or acting under authority derived from him, from farther violating the interdict under a penalty; and found Mr Waldie liable in expenses. In consequence of erroneous information that the action of the river Tweed,

when in flood, upon the chingle above the by-stream, had re- Feb. 10. 1825.
stored the channel to the state in which it was previous to the operations complained of, the Sheriff found it unnecessary to give any order on that part of the cause. Afterwards, however, on advising a report by Mr Jardine, civil engineer, the Sheriff ordained Mr Waldie to employ persons at his own expense to restore the channel of the by-stream, or the north branch of the river Tweed, to the exact state it was in in 1819.

The case having been brought to the Court of Session by advocacy, Lord Pitmilly remitted to the Sheriff, 'with instructions to ordain the defender, Mr Waldie, to employ persons at his expense to restore that part of the stream, or north branch, of the river Tweed which runs opposite to the petitioner's (Duke's) lands, at or above the point C on the plan, to the exact state it was in before the operations complained of in the petition took place; and to adhere quoad ultra.'

Mr Waldie reclaimed. He denied that he had committed any breach of interdict; alleged that some idle people and herd boys, retainers of the Duke, had thrown stones and rubbish into the stream; and that these only, and not any part of the natural bed of the river, had been removed: and he maintained that, at any rate, it was unjust to ordain him to be at the expense of restoring the channel, as he had been in England when the operations complained of had been carried on; that he had not in any way sanctioned them; and that, on the contrary, he had admonished his people on no account to trespass on the Duke's property, or give any cause whatever of complaint, having most pointedly and positively ordered his servants and tenants on their peril not to touch or interfere with the bed of the river, or any part of it that might in the slightest degree counteract the effect of the decision of the Supreme Court.

The Duke answered, that the encroachment and breach had been distinctly proven, and that Mr Waldie was responsible for the acts and conduct of his servants.

The Court altered, advocated the cause, assolizied the defender, and found him entitled to expenses; and on the 1st of March 1822 refused a petition by the Duke without answers.*

The majority of the Judges of the Court of Session proceeded on the principle, that Waldie could not be responsible for the illegal act of his servants, done in his absence, and directly contrary to his express prohibition.

* See L. Shaw and Ballantine, No. 415.

Feb. 10. 1825.

Against these judgments the Duke appealed.

Appellant.—The breach of interdict is fully proved, and the appellant is entitled to a decree against the respondent, since without such decree the restoration of the channel cannot legally be made. The respondent's servants were the guilty parties, in particular the gardener, who had been formerly implicated in a similar offence; and for these parties the respondent is answerable, especially as through these illegal operations the respondent has been benefitting by the rent produced by the mill.

Respondent.—The operation in question was not executed in the respondent's service; it was executed not only without any authority from the respondent, but in direct disobedience to his positive and repeated orders. Even those actually concerned would not be liable, as they only removed rubbish thrown into the stream by others, the appellant's own dependants.

The House of Lords 'ordered and adjudged that the interlocutors complained of be affirmed.'

Appellant's Authorities.—Lord Keith, June 10. 1812, F. C.; Linwood, May 14. 1817, F. C.; Stair's Inst. 1. 9. 5.; Kames' Prin. of Equity, B. 1. p. 1. c. 1. § 2.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 2.

WILLIAM DUNN, Appellant.

ROBERT M'GAVIN and Company, Respondents.

Sale.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That statements made by the agent of a seller to a purchaser, relative to the shipping of certain bags of cotton wool at Liverpool to Glasgow, did not amount to such a misrepresentation as to liberate the purchaser.

Feb. 23. 1825.

2D DIVISION.
Lord Reston.

On the 22d November 1814, when the price of cotton wool was very fluctuating, Dunn, a merchant in Glasgow, bought from M'Gavin and Company, also merchants there, through the intervention of Donaldson, a broker, (who appeared to have acted in that character for both parties), 50 bags of cotton wool, which at the date of the sale were at Liverpool, and were to be delivered on arrival at Glasgow.

Dunn alleged, that at this time the sellers had 176 bags of cotton at Liverpool, of which, however, only 100 were actually shipped: That by the average sample of these 100 bags, he bought the 50 bags; and on the same day other parties bought

the remainder: That Donaldson, in this transaction, had represented the cotton wool so purchased by Dunn as actually shipped at Liverpool, and expected to arrive in a very few days: That he had bought on the faith of this representation: That he relied on receiving his 50 bags by the first arrival, viz. the arrival expected in a few days: That although 100 bags did arrive, yet the whole were delivered to the other purchasers; and that, after waiting day after day, and seeing ship after ship reach the Clyde from Liverpool, with no cotton for him, and the prices rapidly falling, he intimated, on the 2d December, that he would not accept the cottons at all.

Feb. 23. 1825.

The cotton arrived at Glasgow three days after the date of this intimation, and Dunn, persisting in his refusal to accept, M'Gavin and Company raised an action against him before the Magistrates of Glasgow, for payment of the price.

The Magistrates found it admitted by both parties, that the 50 bags of wool in question were sold by the pursuers, and purchased by the defender, at the price libelled, as being at the date of the sale at Liverpool, and to be delivered upon arrival; but before farther judgment, allowed the pursuers and defender a proof pro ut de jure of their respective averments with regard to the points, whether the pursuers or their brokers represented the said cotton as being actually shipped at the date of the sale, or only as about to be shipped? And allowed the parties also a proof pro ut de jure of their averments, tending to shew that they or their agents used all due diligence in procuring the shipment of said cottons after the date of the sale; and allowed to each party a conjunct proof.

A number of witnesses were then examined, and correspondence between the sellers and their agents recovered and produced. The only direct evidence as to the terms of the bargain was afforded by the deposition of Donaldson, who deponed, That he was informed the cotton was lying at Liverpool; and Mr M'Gavin shewed the deponent, or held in his hand, a bill of lading for 100 bags of it; and mentioned that he had letters from his agent, stating that he was engaging freight for the remainder of it, and expected to get it shipped every day: That the deponent was instructed to sell the said cotton, payable at two instalments, one of them running from the day of sale, and the other from the day of delivery, after being weighed over: That after receiving his instructions from the pursuers, the deponent went back to them with an offer from Mr Henry Houldsworth for 100 bags of the cotton, and was told by the

Feb. 23. 1825. ' pursuers; that they could only accept of it to the extent of 50
 ' bags, as they had already sold 76 bags of it: That, in conse-
 ' quence, the deponent concluded a bargain with Mr Houlds-
 ' worth for the 50 bags at the price offered by him of 3s. 4d.
 ' per lb.; and the deponent offered him the other 50 at a 1d.
 ' per lb. more, which, however, he refused: That the deponent
 ' afterwards, in the course of the same day, sold 50 bags of it to
 ' the defender, at the price of 3s. 4½d. per lb.: And on the
 ' defender asking the deponent where it was lying, the deponent
 ' told him it was lying at Liverpool; and on his asking when it
 ' might be expected to arrive, the deponent told him that the
 ' pursuers had received a bill of lading of 100 bags, and they
 ' expected daily the bill of lading for the remainder: and the
 ' deponent, in the course of the conversation with the defender,
 ' may have further mentioned to him, that the cotton was in the
 ' process of being shipped, or about to be shipped; and he may
 ' even have added, that it was shipped, as from the pursuers'
 ' anxiety, and from the letters from their agents at Liverpool,
 ' the deponent thinks the pursuers may have expected the
 ' remainder of the cotton to be shipped by the time the deponent
 ' concluded the said bargain with the defender: That the
 ' defender having again put the question to the deponent, When
 ' the cotton might be expected to arrive? the deponent told him,
 ' it might be expected in a few days, but that it might be weeks,
 ' referring to the uncertainty of the weather, and the time the
 ' vessel might take to perform the voyage, supposing her ready
 ' to sail: That the deponent, however, gave the defender no
 ' reason to believe that the shipment was actually completed, but
 ' only that the remainder of the cotton was in the process of
 ' being shipped, or about to be shipped. Depones, That the
 ' impression on the deponent's mind is, that he mentioned the
 ' uncertainty of the weather as the cause of the uncertainty of
 ' the time of the arrival of the said cotton. Depones, That the
 ' deponent cannot charge his memory, whether he mentioned to
 ' the defender, in concluding the sale with him, that the pursuers'
 ' agent at Liverpool was engaging freight for the remainder of
 ' the said cotton. Depones, That the 50 bags so sold to the
 ' defender were the last 50 of the said lot; and the defender
 ' knew this well enough when he concluded the bargain, as the
 ' deponent mentioned to him that the lot consisted altogether of
 ' 176 bags, 76 bags of which the pursuers themselves had sold, and
 ' that other 50 bags had been sold to Mr Houldsworth before
 ' mentioned, leaving only 50, being those sold to the defender:

Feb. 23. 1886.

‘and although nothing was said between the defender and deponent as to the order in which they should be delivered to the different purchasers, the deponent conceived that the defender’s 50 should be the last 50 that arrived. Depones, That the defender had offered only 8s. 4d. per lb. to the deponent for the said cotton; but the deponent, in communicating with the pursuers, offered a halfpenny per lb. more, taking the responsibility of it upon himself; and when the deponent reported to the defender that he had concluded a bargain for the defender for the said 50 bags at that price with the pursuers, the defender confirmed what the deponent had so done, and took the cotton at the said price.’ The testimony of the other witnesses went to the point, as to whether any delay were imputable to the sellers or their agents? and, what circumstances would have authorized the sellers to have described the cotton wool as shipped or about to be shipped? It appeared, that the pursuers’ agent at Liverpool had arranged with the ship-owners at Liverpool that 100 bales should be taken by the ‘Dispatch,’ then unloading in port; but in consequence of delay in the unloading, the 100 bales were shipped at an increased freight, on board the ‘Jane and Bell,’ with a promise to forward the residue by the ‘Dispatch’ when ready: That the agents communicated this on the 19th November to the pursuers, and enclosed in their letter a bill of lading for the 100 bales: That in the belief that the remainder would proceed with the ‘Dispatch,’ a suttance was passed at the custom-house for the shipment of the cotton: That the pursuers’ agents were disappointed in getting the remainder shipped in the ‘Dispatch,’ but the owners agreed to take it by the next ship, the ‘Sally and Ann;’ and thereon the agents wrote to the pursuers, and again passed a suttance at the custom-house: That the agents were again disappointed from the ship being full; but that at length they effected a shipment by the ‘Hazard.’ The ‘Jane and Bell’ sailed on the 19th November, and arrived at Glasgow towards the end of November. The Hazard cleared out on the 3d December, was windbound until the 10th, and arrived at Glasgow on the 16th.

The evidence led as to what hypothetical circumstances would or would not authorize a party to represent a cargo as being shipped, or about being shipped, or in the process of being shipped, was not conclusive.

The Magistrates then found, ‘that Donaldson was the broker originally employed by the pursuers, and could not be held as the

Feb. 23. 1825. 'mere agent of the defender : found it not distinctly proved, that
 ' at the date of the sale the cotton wool was represented as actu-
 ' ally or completely shipped ; but found it sufficiently established,
 ' that at the date of the sale the cotton wool was held out to the
 ' defender, if not as actually shipped, at least as about to be ship-
 ' ped, or as in the process of being shipped, and such a repre-
 ' sentation in this respect made to the defender, as to afford
 ' reasonable grounds for believing that no delay would take place
 ' in the transmission of the cotton wool from Liverpool to Glas-
 ' gow, from a vessel not having been then engaged to convey the
 ' cotton, or from any difficulty in procuring a vessel for that pur-
 ' pose : found it proved, that at the date of the sale no vessel had
 ' been freighted or engaged to carry the cotton from Liverpool to
 ' Glasgow ; and that, instead of being in the process of being
 ' shipped on the 22d November, the date of the sale, the cotton
 ' was not shipped till the 3d of December, and the vessel did not
 ' sail from Liverpool till the 10th of that month. Further found,
 ' that the evidence adduced rather afforded reason to believe, that
 ' ship-room might have been obtained for the cotton at Liverpool
 ' for Glasgow, by agents usually employed in that trade, earlier
 ' than the 3d of December : found, that the delay thus occasioned
 ' in the transmission of the cotton from Liverpool to Glasgow, by
 ' the pursuers or their agents not having secured a vessel to con-
 ' vey it, as the broker Donaldson gave the defender reason to
 ' believe had been done, relevant, in the then variable and fluc-
 ' tuating state of the cotton market, to liberate the defender from
 ' the contract ; and therefore, on the whole, assoilzied the defen-
 ' der, reserving to the pursuers their recourse otherwise, as ac-
 ' cords ; and found expenses due.'

These judgments having been brought under review of the
 Court of Session, the Lord Ordinary, Reston, repelled the rea-
 sons of advocacy, and remitted simpliciter. Thereafter, on ad-
 vising a representation and answers, he reported the case to the
 Court on informations, when their Lordships, on the 15th No-
 vember 1821, ' altered and recalled the interlocutor of Lord
 ' Reston, Ordinary, represented against ; advocated the cause ;
 ' repelled the defences founded on the representation of the pur-
 ' suers with regard to the shipment of the cotton, and on the
 ' alleged delay in the transmission thereof from Liverpool to
 ' Glasgow ; remitted to the Lord Ordinary to hear parties on
 ' any other points in the cause, and to do therein as he shall see
 ' just ; and found the defender liable in expenses, so far as hitherto

‘incurred,’ &c. To this judgment the Court adhered on the 29th November 1822.*

The majority of the Judges were of opinion, that Dunn had not established his allegation, that it had been represented to him that the goods, at the date of the sale, either were actually shipped, or in the course of being shipped, (which they considered, in the then fluctuating state of the market, would have been relevant to liberate him); but that it rather appeared he was made aware that they had not been shipped.

Dunn appealed.

Appellant.—The representation made to the appellant, and on the faith of which he was induced to become the purchaser, did not correspond with the actual situation of the cotton. This was established by Donaldson’s evidence, from which it appears, that he held out to the appellant, as an inducement to purchase, that the goods would arrive immediately, unless detained by the state of the weather, which clearly implied that they were either shipped, or in the course of being so. But the law weighs most jealously every statement that is made to induce a party to incur a risk or complete a purchase. It is preposterous to maintain that the respondents were not bound to warrant all that their broker stated, but only the average import of his statement. It is neither true nor relevant, that such diligence was used on the part of the respondents to fulfil the bargain, as to exempt them from the consequences of the delay which actually took place. The appellant’s defences are supported and made good by the admitted and proved facts of the case.

Respondents.—When the cotton was sold, the agents at Liverpool were exerting all possible dispatch to get it shipped for Glasgow. The particulars of these exertions were communicated to Donaldson as a guide in effecting sales. If Donaldson acted for both parties, it must be held, that he communicated to both all he knew, even if it were not precisely proved that he had imparted to the appellant the exact state of the cotton when sold. Donaldson’s evidence does not bear out the appellant’s description of the alleged representation. What he did represent was correctly true, as is proved by letters and parole evidence. Besides, the cotton sold to the appellant was the last of the cargo of 176 bags. This was known to the appellant before he purchased; and, according to mercantile usage, delivery is made to different

Feb. 23. 1825. purchasers of parts of the same lot in the order of the sale. There was no undue delay in shipping the cotton at Liverpool; indeed it arrived in Glasgow within the average time that is taken to transmit goods from Liverpool to that port.

After hearing the Counsel for the appellant, and without hearing the respondents' Counsel, the House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed.'

Appellants' Authorities.—2. Dow's Reports, p. 266. ; 2. Starkie's Reports, p. 434—255. ; 1. Moore's Reports, p. 109. ; 3. Campbell's Reports, p. 462.

No. 3. MABERLY and Company, Appellants.—*Jno. Campbell.*

The GOVERNOR and COMPANY of the BANK of SCOTLAND,
Respondents.—*Walker.*

Bank-Notes—Obligation.—A person having cut in two the notes of the Bank of Scotland, for more safe transmission, (as he alleged), and one set of the halves having been stolen, and the Court of Session having found that the Bank was not bound to pay on production of the other set of halves, although the value of the stamp, and charges for issuing new notes, were offered, and security against any demand being made for the lost halves; the House of Lords reversed the judgment, and remitted to allow a proof of an averment, that the notes had been cut maliciously and designedly to injure the Bank.

March 1. 1825.

2D DIVISION.
Lord Cringletie.

MESSRS MABERLY and Company established a banking-house in Edinburgh, with agents and correspondents in different parts of Scotland. Their agent at Aberdeen requiring to send them a parcel of notes of the Bank of Scotland, cut the notes into two, and transmitted the one set of halves by the mail-coach. The parcel was lost or stolen on the route. The other halves, however, of the notes, dispatched by a subsequent day's post, safely reached their destination.

Maberly and Company applied to the Bank of Scotland for payment of the value of the notes, of which they tendered the halves which they had received, and offered reimbursement for all charges attending the issuing new bank-notes in place of those cut, and undoubted security, to the Bank's satisfaction, that no demand would ever be made for the value of the half-notes amissing. The Bank having refused to pay the value, Maberly and Company raised an action against them, stating, that they had required the defenders, by their treasurer, Ro-

best Forrester, to pay the sum of L.270, 'upon receiving satisfactory indemnity against any possible claim from the holder of the halves of the said bank-notes which are amissing, and upon payment by the pursuers to the said Bank of all charges attending the issuing of new bank-notes to the extent foresaid;' and therefore concluding for payment, 'with interest from the day the demand was made,' 'upon the pursuers producing to the Bank the halves of the said bank-notes now in their possession, and finding indemnity or caution to the effect foresaid, and in such terms as shall be approved of by our said Lords, and the pursuers being at the expense which may be incurred by the said Bank in reissuing new notes to the extent of the said sum of L.270.'

March 1. 1882.

The Bank of Scotland gave in defences, bearing that they 'were not bound by law to acknowledge in any way the half-notes on which this action is founded, more especially as the documents referred to in the summons were purposely mutilated by the pursuers themselves.'

The Lord Ordinary appointed the parties to lodge informations, with condescendence and answers, of those facts and circumstances which they averred and offered to prove.

In the condescendences the pursuers offered to prove, that the cutting of the notes was for the purpose of the safe transmission of the one set of halves by the mail; that they had not reached their destination, having been lost or stolen from the coach; somewhere, it was believed, between Perth and the Bridge of Earn; that the halves of the notes which arrived safely, and were produced in process, exhibited both the number and dates of the notes—these having been marked on them, from the halves lost, by the clerk of the pursuers—and that the halves produced were, *de facto*, halves of entire and completed notes regularly issued by the Bank, and which could be identified by the Bank's books. The Bank on the other hand alleged, that nothing could be traced *ex facie* of the halves produced, by which to ascertain whether all of these halves originally formed part of entire and complete notes; or whether, holding them to have been complete, they ever issued from the Bank of Scotland; that the formation of new notes is attended with trouble and risk, and the expense far exceeds the amount of the stamp-duty; and that it is impossible duly to attend to the arrival and presentment of the other halves, in the event of their reaching the Bank.

The Lord Ordinary having reported the cause to the Court,

March 1. 1825. their Lordships, on the 27th February 1822, sustained the defences, assolizied the defenders, and decerned with expenses. At the same time the Court permitted the Counsel for the pursuers to give in a minute, stating the substance of their viva voce pleading that day; and the Counsel for the defenders to state their answer in the same manner. A minute was accordingly lodged, craving that the opinion of English Counsel should be obtained, before final judgment be given. The defenders answered, that, according to the known rules of the Scotch law, the pursuers had no right to recover; and if the Court were convinced of this, it was idle to refer to the law of any other country. No deliverance proceeded on this; but, on the case being again moved, expenses were modified in proper form.*

Maberly and Company appealed.

Appellants.—Where a security is given for payment of a debt, the loss, destruction, or extinction of the instrument or security does not of necessity involve an extinction of the debt itself: on the contrary, the debt still continues to exist, and may be established by other evidence. No doubt the debtor is entitled to full indemnity against any possible loss he may sustain in consequence of the non-production of the instrument at the time of payment; and here the best possible indemnity is offered. The creditor is entitled to require payment on offering such indemnity. But if this be the case where the security has been lost in toto, much more will the equitable rule hold, where only one portion of the instrument has been lost, and the other preserved. As to the notes being intentionally mutilated—thereby inferring an illegal purpose on the part of the appellants,—there is no illegality with reference to the Stamp Acts, and nothing tortious with reference to the respondents, since the expense of a reissue to the amount of the loss, including stamp-duties, has been offered to them. Besides, the Bank have repeatedly paid notes which had been similarly cut for the purpose of transmission. The solution of the question is clear by the law of England. In Scotland, the same point does not seem to have ever previously occurred. If so, this being a question, not of particular law, but of general and universal equity, whatever substantial principle of equity has been established by the Courts in England, the Scotch Courts ought, if the point be new there,

* See 1. Shaw and Ballantine, No. 406; and Fac. Coll.; where the opinions of the Judges are given.

to adopt, if not prevented by any peculiar form of practice, or special rule of law. But even *ex convenienti*, looking to the demands of commerce for the rapid transmission of negotiable securities to distant places, with safety from accident and loss, this judgment of the Court of Session ought to be reversed. March 1. 1823.

Respondents.—Each of the halves produced is a left-handed one, (the notes having been cut vertically), containing the number of the note, the government stamp, and a few engrossed words and parts of words; and, with the exception of the number, nothing is written. There are neither date nor subscription: these are on the right-hand portions. Thus, it is impossible to say whether, *de facto*, the fragments produced were ever regularly signed and issued. If the appellants proceeded by an action of proving the tenor, a Court of equity might interfere. But in the present shape, neither common law nor equity can give redress. According to strict law, a bank-note is to be viewed as a written obligation, and, like all writings which owe their efficacy to their being subscribed, it is useless unless bearing the subscription. But the obligation to pay depends on the existence of the whole note. Here there is only a portion of the document, and that without authentication. To say that there was an original obligation constituted, is not an answer; for the evidence of this obligation is not an unvouched fragment; and even if there were evidence of the fragment having formed part of a genuine note, the mutilation was the tortious work of the appellants. This is not an action of debt, but an action resting on an unvouched scrap of paper. The destruction of the document is the destruction of the debt. The offer of indemnity is out of place. The misfortune of being obliged to pay at all a debt which is not proved, is one against which the offer of security affords no protection. As to redress at equity, it is plain that there is no equity in holding a signature to be, when it is not. No doubt there is a remedy for mutilated deeds, but not the one the appellants have resorted to. Let them restore the deed, and then they will be in a proper shape to ask payment. Besides, the mutilation was not accidental, but of set purpose; and no person is entitled to ask equity to repair his own fault or imprudence. If this practice should be sanctioned by a Court, the utmost inconvenience would result, and the operation of banking would be in a manner palsied. The indemnity offered is altogether insufficient to protect the respondents. This is a Scotch case, and must be determined by Scotch

March 1. 1825. rules. But even in England no demand similar to what has been made here has been sustained.

The House of Lords. 'ordered and adjudged, that the interlocutor complained of be reversed; and it is further ordered, that the cause be remitted back to the Second Division of the Court of Session, for them to allow a proof, and further to proceed in the cause as shall be just.'*

LORD GIFFORD.—My Lords, Upon reference to the appellants' case, it appears that this is the first time that a question of this sort has occurred in Scotland; and it has been contended, that you were bound to consider and decide the question upon the Scotch law, and not upon the English law, except so far as any analogy may be fairly drawn from the forms of proceeding in the one country and the other.

My Lords,—The circumstances of the case are shortly these:—Messrs Maberly, the appellants in this case, are bankers at Edinburgh, and in the course of their dealings they had frequent occasion to receive from their agents and correspondents in different parts of Scotland, large sums of money in the notes of the various banking companies of Scotland. On the 8th of December 1818, the agent of the appellants at Aberdeen transmitted to their manager or agent at Edinburgh a number of bank-notes, at least the halves of a number of bank-notes, for the security of Messrs Maberly, and to avoid what has occurred in this case, namely, the loss of the notes; and they adopted a practice which is adopted in this country, namely, of separating the notes, and dividing them, and sending one-half by the post, and, as it should seem, the other half they sent by the mail-coach, in a parcel, which was stolen from the coach. The consequence was, that the halves so sent have never been found. Under these circumstances Messrs Maberly applied to the Bank of Scotland, stating the accident that had occurred, that they had used all due diligence to recover the parcel that had been taken from the coach, but without effect; and stating, that they were in possession of the halves of the notes they had received by the post, and offering to indemnify the Bank of Scotland against any future demand which might be made upon the halves that had been stolen, and to secure them against any possible loss that might occur to the Bank from the accident that had happened.

A great deal has been stated as to the previous transactions and differences between Messrs Maberly and the Bank of Scotland, and the habit of Messrs Maberly of mutilating the notes of the Bank of Scotland. I must confess that I do not see the application of those

* See the ultimate decision, 4. Shaw and Dunlop, No. 362.

differences to the present case; because, whatever might be the case if Messrs. Maberly have improperly and wantonly attempted to mutilate the notes of the Bank of Scotland, that is not this case; because, from the facts I shall presently state to your Lordships, it will appear that it was offered to be proved (and they rest their claim in this case upon that), that they divided these notes, from the caution and care they thought necessary for their own interest, and not to prejudice the Bank of Scotland, but in order to secure to themselves a demand against the Bank of Scotland, and in order to guard against the accident that has happened here. And from the letter stated in the summons, they originally put their demand, not upon any legal ground, in this instance, but they put it to the liberality of the Bank of Scotland, whether they will not, without hesitation, pay them the amount of the notes, they receiving an indemnity. It appears that the Bank of Scotland, upon looking at the circumstances, were not moved, from what had taken place between Messrs. Maberly and themselves, to accede to that; and then Messrs. Maberly, after some time, repeated their demand upon the Bank of Scotland in a more authoritative tone, not putting it upon the liberality of the Bank, but claiming it as a legal demand; and, upon that being resisted, they subsequently instituted the action that forms the subject of this appeal. Under that action they allege, that they have possession of these notes of the Bank of Scotland, which they describe by the numbers, and, as far as they are able to ascertain them, the dates and the amounts. They then state the circumstances I have shortly detailed to your Lordships. They set out the letters, and conclude the summons by stating,—‘That although they have often required the defenders to pay them the sum of L. 270 sterling, upon receiving satisfactory indemnity against any possible claim from the holder of the halves of the said bank-notes which are missing, and upon payment by the pursuers to the said Bank of all charges attending the issuing of new bank-notes to the extent aforesaid, yet they refused, or at least delayed so to do; and therefore they pray that it may be discerned and ordained, that the defenders shall pay to the pursuers the sum of L. 270 sterling, with interest from the time of the demand, upon the pursuers producing to the Bank the halves of the said bank-notes now in their possession, and finding indemnity or caution to the extent aforesaid, and in such terms as shall be approved of by our said Lords, and the pursuers being at the expense which may be incurred by the said Bank in reissuing new notes to the extent of the said sum of L. 270.’

March 1. 1825.

My Lords,—I collect, from the whole of these proceedings, that this is in the nature of an equitable demand against the Bank of Scotland, founded upon the equitable circumstances stated, and on the offer made by Mr. Maberly to indemnify them against any claim that might be made upon them. This action having been thus instituted, the Bank of Scotland put in their defences, not objecting to the form

March 1. 1895. of proceeding; not interposing any dilatory plea; not maintaining that this action could not be sustained without the production of the documents; not stating that an accessory action ought to be brought to prove the tenor; but they state, 'the defenders are not bound by law to acknowledge in any way the half-notes on which this action is founded, more especially as the documents referred to in the summons were purposely mutilated by the pursuers themselves.' Upon this defence being put in, the matter came before the Lord Ordinary, and he pronounced the following interlocutor:—(His Lordship then read it).

My Lords,—In consequence of that interlocutor a condescendence was put in by the Messrs. Maberly, by which they offered to prove, what I may state shortly without going through the various articles of the condescendence—that they were in the possession of these notes; they offered to prove the circumstances of the transmission and the loss; and they state they shall be able to prove the identity of the notes that had been thus lost. In answer to that, the Governor and Company of the Bank of Scotland state the practice of Messrs. Maberly cutting the notes into halves; but Messrs. Maberly deny that they cut the notes wantonly. The other allegations go on to state the facts I have already mentioned to your Lordships. The respondents only say in answer, that they have no opportunity of knowing whether the averments stated be correct or not, but they have little doubt that they are. Perhaps that is not a distinct admission of the truth of these allegations, and it might be necessary for the pursuers to prove, supposing the Court had thought it necessary that the proof should be given, but they admitted that they had little doubt of the truth of the statements of Messrs. Maberly. They state, 'that all the halves of notes now founded on by the pursuers are left-hand halves, and that there is nothing apparent on the face of these left-hand halves, or discoverable in any other way that the respondents know of, by which it can be ascertained whether all of these halves originally formed parts of entire and completed notes, or whether, supposing the notes to have been so completed, they were ever issued by the Bank.'

Now, in this stage of the proceeding, the matter came before the Lords of the Second Division; and after hearing the cause argued, they pronounced this interlocutor, against which the appeal is brought:—(His Lordship then read the interlocutor). The effect of their decision is to assolvie the Bank of Scotland altogether from this demand, and to sustain the defences put in to this action. Against that decision this appeal has been brought; and the case has been very elaborately and ably argued at your Lordships' Bar. The objections that have been made to this decision are, That Mr. Maberly had a right to the equitable interference of the Court upon the grounds stated in this summons; and inasmuch as the halves of these notes had been thus stolen, and therefore there was a possibility that the Bank of Scotland

March 1. 1825.

might hereafter be troubled by the production of those halves in the hands of a third person, Messrs Maberly felt that they had no right to demand payment, except upon giving indemnity to the Bank against the liability—I cannot call it a liability—but against the demand to which they might be exposed. To this it is said by the Counsel for the Bank, first you must prove the identity of the notes, and then give a sufficient indemnity. In this case you cannot prove the identity of the notes, nor was the Court of Session in a condition to decide upon that. To this Messrs Maberly say, they can prove it, and that they offered to prove it; and it is a little too much, because that is refused by the Court of Session, to say that you are to take that as a sufficient proof that it cannot be made out. The Court of Session said, whether you can prove it or not, you are not entitled to relief; therefore, as to the proof of the identity, we are not in a situation to say whether it can or cannot be proved. The question is, Whether, in this stage of the cause, it was not right that Messrs Maberly should be let into this proof? In the next place, the Bank argues, that Messrs Maberly cannot give a sufficient indemnity to the Bank. What is it, it is asked, are you to indemnify against? and it is said, that these halves may appear at various times, and produce great inconvenience; and that if you decide against the Bank of Scotland, you must decide that half notes are as negotiable as whole notes; and the Bank would be put to great inconvenience if you so decide this case. But the decision of your Lordships, supposing you should be of opinion that the Court of Session have not come to a right conclusion, will not produce any such effect. It is only in a case like the present, where the loss has happened, by mere accident, to the other halves of the notes; and it would be very difficult for any body to obtain payment, under any circumstances, for the other halves; because, in one of the English cases, *Mayor v. Johnston*, in the third volume of Mr Campbell's Reports, I observe, and also in a very learned work upon Bills of Exchange, written by a person in a high judicial situation, very great doubt was entertained, whether a party could recover at law, because any body in possession of the other half note, for valuable consideration, might come upon the Bank. But no Bank would pay that half note at once without a full inquiry into the circumstances under which the party had obtained it. Therefore it would be very difficult for the holder of any half note that had been stolen to recover it from the Bank. I mention that as one of the difficulties that a person would be under that had got possession of the half notes that had been stolen. There would be no difficulty in any Bank guarding against their clerks or agents paying the halves of notes that had been thus lost, without a previous inquiry into the circumstances; and therefore it does appear to me, that there is not any great difficulty in preparing an indemnity that should secure the Bank of Scotland against any subsequent payment of them. But then the Court of Session have decided that the pursuer was not entitled to relief; to which decision your Lordships

March 1. 1825. are bound to pay the greatest respect, and to attend to their reasons, more particularly when you have any doubt in agreeing to those reasonings. But I apprehend that the ground of the decision is this, namely, that because the mutilating of the notes was a voluntary act of Messrs Maberly, (although the subsequent loss was not their act, being by mere accident), and because they voluntarily cut the notes, they can have no relief in law or equity upon the halves they have secured, in consequence of the others being lost by an act of theirs. The separation of the notes was their voluntary act; and they consider that a party so conducting himself cannot come into a court of equity, because the party has been guilty of a tortious act. I have already said, that if it could be shewn that Messrs Maberly did wantonly, and merely to injure the Bank of Scotland, destroy their notes, then, when that case arises, the Court of Session and this House will know how to deal with it. But the question here is, Whether, without any intention to injure the Bank, but where, merely to secure themselves, they separated the notes, that is such an act on their part—voluntary undoubtedly—as precludes them from having recourse to any equitable proceedings against the Bank of Scotland for payment of these notes, the halves of which are produced, they indemnifying them for any loss? If the case rested on that question, I should have no difficulty in stating my opinion, that that is not sufficient to prevent Messrs Maberly having their equitable claim; and, therefore, if that was the ground of the decision, I should have no difficulty in advising your Lordships to reverse this interlocutor, and then remit it, as it must be remitted, to the Court of Session, to proceed further with this case as they may think fit.

But another question has arisen, and been discussed very ably at the Bar, that whatever might be the case in this country, your Lordships are to be bound by the forms adopted in Scotland; and that the pursuers in this case have mistaken their remedy, and whatever their ultimate rights might be, your Lordships cannot disaffirm the present interlocutor without infringing upon the rule of proceeding in the Courts of Scotland. This, to be sure, is a case proceeding upon the principles recognized in the Courts of Scotland; but in any view of the case this interlocutor cannot be right; because one of the grounds taken on the other side of the Bar, and which was admitted by the Counsel for the Bank, was, that the Court of Session have done wrong in assailing the defenders and sustaining the defences, because the utmost they could have done would have been to put the pursuers to have brought their action to prove the tenor, or they might have pronounced this judgment without reference to any other proceedings; but they have done no such thing—they have assailed the defenders and sustained the defences. As I understand the opinions of the Judges, they do not proceed, any one of them, upon the ground that this was not the proper form of proceeding, nor on the ground that, from the circumstances stated by Messrs Maberly, they were

March 1. 1825.

not entitled to equitable relief; but they say, although you may prove all your circumstances, you are not entitled to the relief you pray for, because the mischief has happened by your own voluntary act. That such is the ground of decision of the Judges, I think no man, who has read the notes, can doubt. Lord Robertson was of opinion, that the pursuers were entitled to the relief they sought by this mode of proceeding. My Lord Glenlee entertained no doubt upon the form of proceeding; but he stated, that although Messrs Maberly might prove the circumstances connected with the loss of the notes, they were not, in his opinion, entitled to relief, unless the legality of cutting the notes was first cleared up. My Lord Bannatyne stated, that the cutting of the notes did not appear to be accidental; that it created a difficulty in identifying them; and therefore he conceived the pursuers were not entitled to relief. My Lord Craigie proceeded upon the same ground; but he concluded that part of his judgment by saying, 'I think on general principles of law and equity we ought not to sustain this demand. We have a remedy well established in our law for such a case—an action for proving the tenor. There it is necessary to prove, not only the form of the document, but that it has been lost by a misfortune not imputable to the pursuer himself. I do not think we can allow a proceeding of that kind here.' So that his opinion was, that no action to prove the tenor in this case could be sustained.

My Lord Justice-Clerk proceeded, in a very elaborate judgment, to point out why, in his opinion, the pursuers were not entitled to equitable relief. He says, 'It is pretty clearly admitted by the pursuers, that it is not a question of law, but of equity; and though I admit that in a case of this kind it is quite legitimate to refer to the law of England, I think it is now a settled point, that no action at common law would lie in the Courts of England.' Then he goes on to say, 'Is there any thing in the equitable powers of this Court to entertain this? I must confess that I cannot see that there is.' Then he goes on to state the reason: 'A party must shew that he has done nothing injurious to the other party. I can never lay out of view that this case has arisen from the act of Mr Maberly himself. I have got no light on the right to cut the notes *ad libitum*.' Messrs Maberly certainly had no right so to do this; they could not have justified the act in this case, unless it had been done with the motive they allege and offer to prove, for the purpose of transmission, and to secure themselves. Then he goes on to say, 'I must be of opinion that we cannot sustain this action as laid. Although it is offered to find security to the extent of relieving the Bank of any other demand on these notes, and with an offer to prove their identity by the books of the Bank, it is obvious, that if the practice is declared to be lawful, there is a complete dislocation of the business of the Bank, as they must establish at every branch a variety of clerks, in order to prevent their paying the same note a second time. Then the

March 1. 1825. 'question is, Whether in equity we are bound to give effect to this claim. I cannot accede to the doctrine contained in the papers of the pursuers, for it is obvious that there are certain risks to which the Bank is exposed. If it were an action such as that referred to in England appears to be, or, as we call it, a proving of the tenor, it would be a different thing; but this is not a proving of the tenor.' His Lordship then takes a distinction between a proceeding strictly at law, and a proceeding for equitable relief.

I apprehend, when an action is brought, and the party proves the tenor, and then proceeds to recover the debt, there would be no need for an indemnity; but this is a proceeding for equitable relief, upon the ground of offering an indemnity. The question then is with respect to the form of entering your Lordships' judgment reversing this interlocutor; for that this interlocutor cannot stand is quite clear from the arguments of the learned Counsel for the respondents, and your Lordships are not convinced by their arguments that the appellants were not entitled to equitable relief. I mean, if the circumstance of their having voluntarily cut the notes does not deprive them of that equitable relief, it is impossible this interlocutor can stand. The only question would be, whether, under the circumstances alleged on the part of the respondents, in what form your Lordships would pronounce your judgment? That the case must go back again to the Court of Session, is quite clear, because I apprehend, if it is required by the Bank of Scotland that the pursuers must go into proof of the matters in their summons, the interlocutor must be reversed. The only question is, in what form it should be entered? My present impression certainly is, that this objection as to the action upon the tenor comes too late, even if it could be originally sustained, because they have gone into their defence generally, and the Court have proceeded upon it. I think, upon looking at the whole of the judgments, that the Court were of opinion, that if the circumstances were sufficient to entitle the pursuers to the equitable relief sought, it was not necessary for the party to proceed to an action upon the tenor. Therefore, upon both these grounds, I should say first, this objection not having been taken in the first instance, and looking at the decision of the Judges, the result seems to have been, that this was a proceeding which could be sustained without that formal action to prove the tenor, if the circumstances entitled the pursuer to equitable relief. The only point upon which I should ask a day or two to decide, would be upon the form of reversing this interlocutor. But I have no doubt in saying, that I think this action is sustainable, and that the interlocutor must be reversed. I only ask a day or two to consider in what form your Lordships would pronounce that reversal. But I should move your Lordships that this judgment should be reversed.

25th February 1825.

LORD GIFFORD.—My Lords, In the case of *Maberly v. the Bank of Scotland*, I stated to your Lordships, the last day I had the honour

of being in your Lordships' House, that, in my opinion, the interlocutors should be reversed. The only point which remained was the form of your Lordships' judgment. Considerable questions were argued, which it is not necessary for your Lordships now to decide; and I would move your Lordships, that this interlocutor be reversed, and that the case be remitted to the Court of Session, in order that they may allow of proof, and further proceed in this cause as they may see just. March 1. 1825.

Appellants' Authorities.—1. Vesey, 343.; Pothier on Obligations, 4. 2. 6.; Marius' Bills of Exchange, p. 19. fol. ed.; 12. Mod. Rep. 309.; 1. Vesey, 341.; 2. Vesey, 38. 6. Vesey, Jun. 812.; 2. Campbell's Rep. 214.; 3. Campbell, 324.; 16. Vesey, Jun. 430.; 4. Price, 176.

Respondents' Authorities.—3. Campbell, 324.; 6. Vesey, Jun. 812.; 2. Campbell, 211.

FOULKES, LANGFORD, and WALFORD—J. CHALMERS,—Solicitors.

WILLIAM TAYLOR, Appellant.

No. 4.

JAMES KERR, (Taylor's Trustee), Respondent.

DURING the dependence of the appeal entered by the appellant of the interlocutor refusing to recall the sequestration of his estates under the Bankrupt Act,* the Court of Session, under the authority of the 67th section of that statute, appointed the creditors to meet in order to choose commissioners. Against this order the appellant also appealed; and the first appeal having been dismissed, the House of Lords, after hearing the appellant in person at the Bar, 'ordered and adjudged, that the 'appeal be dismissed, and the interlocutor complained of affirmed, with L. 100 costs.'

March 2. 1825,
1st DIVISION,

J. DUTHIE—THOMAS,—Solicitors.

* See 1. Shaw's Appeal Cases, p. 254.

No. 5. ANDREW M'DOUALL, of Logan, Esq., Appellant.—
Lushington—Ksay.

ALEXANDER M'DOWALL, Respondent.—*Jenner—Abercrombie.*

Wreck—Reparation—Expenses—Interest.—Circumstances under which (affirming the judgment of the Court of Session) a party dispossessing a salvor was found liable in damages and reparation to the owner of the vessel, and interest allowed on the expense of extracting the Judge-Admiral's decree.

March 8. 1825.

2D DIVISION.
 Lord Pitmilly.

By a crown-charter erecting M'Douall of Logan's land into the barony of Logan, the privilege and liberty of 'wrak, wair, et waith' was granted.

Notice having been given to Logan that a brig was seen in distress, (which was afterwards found to be the Lord Nelson), off the mill of Logan, or Balgowan point, a headland forming part of his estate, he dispatched his two principal servants to gather a crew to assist the ship, and as an authority issued this warrant:—'Whereas I am informed there is a dismasted ship floating off the point of Balgowan, I therefore grant warrant to Alexander M'William and John Scott, both my servants, to go and take charge of the said ship, and carry her into the nearest place of safety, or to Chapelrossan Bay, for behoof of the owners or insurers, and to employ what men they may see necessary to assist them, and to discharge any that may disobey these orders, or act improperly, and report the same. This I do on the 18th of November 1810, as Admiral and Justice of the Peace.'

Logan's men took possession of the vessel, under the circumstances detailed in the interlocutor to be immediately quoted, run her ashore in Chapelrossan Bay, where they dug an inlet or dock for her to lie in, from which, however, she was driven by a gale of wind, and cast on a beach of stone and shingle, and materially damaged.

It appeared, that previous to the approach of Logan's party, Alexander M'Dowall, residing in Drummole, having discovered the vessel, proceeded with a sloop called the Druid, and along with his crew boarded the vessel; that they carried her to a bay, and that M'Dowall left her there at anchor under the charge of four men, but who were afterwards ejected from possession by Logan's party. After much correspondence to effect an amicable arrangement, Alexander M'Dowall on his own behalf, and as agent of the owners, Captain Lewis and others, with concurrence of the Procurator-fiscal, raised an action in the Admiralty Court against Logan, concluding that he ought to be ordained to make payment to the pursuer, Alexander

M'Dowall, for himself, and as agent of Captain Lewis and the other owners of the brig and her cargo, of the sum of L.4261, as the price, worth, or value of the vessel, and of her cargo, or of such sum as should be ascertained to be equal to the value of the ship and cargo when Logan and his party seized her; and L.800 as a solatium in name of damages for the loss of time, trouble, and expense, to which the pursuer and Lewis had been exposed in consequence of Logan's illegal and improper conduct, and salvage and expense of process; or, at all events, ought to be ordained to restore and redeliver to the pursuer and Captain Lewis, the vessel, with her whole materials and appurtenances, and the cargo, in the state she then was, and L.2000, or such sum as might be ascertained to be the difference between the real worth and value of the brig when first seized on by Logan and his party, and the present diminished value, and damages, salvage, and expense; and, lastly, that the said defender ought and should be farther publicly punished by imprisonment or otherwise, or fine to the public prosecutor, in such way and manner, and to such extent, as may appear suitable to the whole circumstances of the case, in terrorem of others to commit the like offences in time coming.

A proof was allowed and led, on advising which, and memorials, the Judge-Admiral, on the 19th March 1812, found it proved, ' That on Saturday the 17th of November 1810, a brig ' was discovered by the pursuer, Alexander M'Dowall, in seemingly great distress in the Bay of Luce, who generously prevailed with the master of the sloop Druid, then lying in the ' harbour of Drummore, partly loaded with a cargo belonging ' to the pursuer, to go out at considerable risk, which the pursuer undertook to bear, both to the ship and cargo, to assist ' the vessel in distress: That the said vessel was discovered to ' be water-logged, and deserted by the crew; but that, owing to ' the sea running high, those in the Druid could not venture on ' board, and returned to Drummore on Saturday night: That ' the next morning, being Sunday the 18th, the said pursuer, ' with various assistants, went out to said distressed vessel, and ' got on board, when they discovered it was the brig Lord ' Nelson, having lost her main-mast and the fore-mast above the ' maintop, completely water-logged, and having none of the ' crew on board; and that they carried the ship to a part of the ' coast off the windmill of Logau, on the west side of the Bay of ' Luce, where they cast anchor; and the pursuer left the vessel ' with a guard of four men on board, to defend her against

March 8. 1826.

March 8. 1825.

‘plunder, and to retain possession till he should return on
‘Monday morning with assistants to carry the vessel into Drum-
‘more harbour, which, from all accounts, seems to be the only
‘harbour, and the only place where there are warehouses, on
‘the west side of Luce Bay: That immediately on getting ashore
‘from the vessel, the pursuer reported her situation, and his
‘having taken possession of her, to John M’Connel, officer of
‘the customs, who, on that same night, reported the whole
‘to the collector of the customs at Stranraer: That during the
‘night of Sunday the 18th, the defender sent a party on board
‘the Lord Nelson, then at anchor, who, by his orders, took
‘possession of the said vessel from those left by the pursuer to
‘guard her and retain possession for him: That on Monday
‘the 19th, the pursuer returned to the ship, with a numerous
‘party to assist him, furnished with instruments for warping the
‘ship off the coast, and taking her to Drummor, when he found
‘that those on board had lifted the anchor, and were allowing
‘the ship to drift ashore among the rocks; but that there is no
‘evidence of their having done so by order of the defender:
‘That he endeavoured to prevent this, by warping her out from
‘the shore with the view of getting her to Drummor, but was
‘obstructed and commanded to desist from so doing by the
‘defender and his people, whom he desired to take the ship to
‘New England, or Chapelrossan Bay, both of which being open
‘bays, without a harbour of any sort, and having stony shores,
‘are not said by any witnesses in the cause to have been either
‘of them a place of safety; and there does not appear in the
‘proof the slightest ground for the defender doing so, from ap-
‘prehension of the said pursuer embezzling any of the cargo;
‘while, on the contrary, it is established that this conduct arose
‘solely from the defender considering himself to be Admiral
‘of the shore, and, as such, entitled to take the vessel under his
‘own exclusive charge: That in consequence of this obstruction
‘and commanding power of the defender, as calling himself
‘Admiral of that part of the shore, and Justice of the Peace, the
‘pursuer left the vessel to the defender, and, in name of all con-
‘cerned, protested against him for all damages which might
‘arise from such conduct: That during all Monday the weather
‘was moderate, and if no obstruction had been made to the pur-
‘suer, there is every reason to believe that the vessel might have
‘been carried with little expense to Drummor, where, although
‘she might not have got into the harbour that night (owing to
‘her having been water-logged), she might have been bored next

March 8. 1825.

' morning, as she was afterwards, to let the water out, and then
 ' with ease have got into the harbour, where she would have
 ' been in safety, and where her cargo would have been unloaded
 ' and safely warehoused: That by the pursuer's conduct, the
 ' ship was left off the coast, at anchor, on the 19th, at night,
 ' where, owing to the weather having become blowy, she lay
 ' till Friday the 23d, when, on the weather becoming again
 ' moderate, she was carried into the open bay of Chapel-
 ' rossan, where, her inside water having been drawn off by
 ' holes bored in her bottom, she was drawn on the shore, and
 ' the cargo was begun to be unloaded on the 24th, and, in the
 ' course of that and the five following days, was carried into a
 ' field, where it lay many days exposed to the weather, and
 ' guarded by men night and day; and that the vessel, after being
 ' unloaded and put into a sort of dock cut for the purpose out of
 ' the shore, and moored there, was driven out of it by the wind
 ' and tide from her moorings, and suffered considerable damage
 ' by being dashed on the shore, which, in the place where she
 ' was lying, is composed of chingle and stones: That the statute
 ' 26. Geo. II. c. 19. does not apply to Scotland; and although
 ' the Act 12. Queen Anne, c. 13. did extend to Scotland,
 ' which it is not ascertained to do, yet that statute does not con-
 ' fer on Justices of Peace a right to command vessels in distress,
 ' nor apply at all to the present case; so that, as Justice of the
 ' Peace, the defender had no authority to assume possession of
 ' the ship: That as the pursuer had thus taken possession of the
 ' vessel in open seas, and reported to the custom-house his in-
 ' tention of preserving the vessel and cargo for behoof of all con-
 ' cerned, and as the vessel was afloat and had not touched the
 ' shore when the defender took possession, she was not a wreck
 ' in terms of law, whereby his grant of wrecks in his charters
 ' (even although they were produced, which they are not) gave
 ' him no title, under any right of admiralty for his own interest,
 ' to interfere with the pursuer, who had previously assumed law-
 ' ful possession of the vessel in the open seas, for behoof of all
 ' concerned: That after taking possession, his whole conduct
 ' was injurious to the owners of both ship and cargo, by occasion-
 ' ing damage to both, besides great expense; and consequently,
 ' as a claim for salvage arises from the benefit done to the real
 ' owners to save their property, and indemnification for expenses,
 ' ex utilitate in negotiis gestis, the defender is not only not en-
 ' titled to salvage or expenses, but by his interference with those
 ' who, to a certain extent, had already saved the vessel, and

March 8. 1825. ' would have placed her and the cargo in safety, has subjected
 ' himself in damages to the owners on that account, and also for
 ' his detention of the vessel until the salvage and expenses should
 ' be paid, or security given for them : But assailed him from the
 ' claim for the value of the ship and cargo, in respect that both
 ' have been returned to the owners, and also from the conclusion
 ' for fine and personal punishment ; but found him liable for
 ' damages and expenses, and allowed a condescendence thereof
 ' to be put into process.' Thereafter the Judge-Admiral, in ad-
 hering to this interlocutor, acquitted Logan ' entirely of having
 ' given any orders to his people to cut the cables of the Lord
 ' Nelson that the vessel might drift ashore on the rocks, and of
 ' his having left her at anchor from the 19th to the 23d of No-
 ' vember off the coast, when she might have been taken to a
 ' place of safety.' After further procedure, the Judge-Admiral,
 in December 1814, decerned against Logan for L.446. 14s. 9d.
 damages ; L.384. 11s. 4d. expenses ; and L.159. 9s. as the expense
 of extracting the decree and proof.

Both parties brought reductions in the Court of Session, and
 Logan also suspended. These three actions were conjoined ;
 and the case having been discussed, the Lord Ordinary found
 ' Logan, the defender in the first reduction, liable to indemnify
 ' the pursuer for the additional loss and expenses which the
 ' owners sustained on account of the ship and cargo, in conse-
 ' quence of the defender having taken possession of the vessel,
 ' and having carried her to the Bay of Chapelrossan, and hav-
 ' ing detained her there, beyond the loss and expenses which
 ' would have been incurred by the pursuer on account of the
 ' ship and cargo, and of demurrage, had the defender not inter-
 ' fered ; and had the pursuer, Alexander M'Dowall, been per-
 ' mitted to take the ship in her disabled state to a place of safety
 ' in the bay or harbour of Drummorie, which, it appears from
 ' the proof, might have been accomplished on the 19th of
 ' November 1810 : finds, that the difference between the amount
 ' of the loss and expenses which the pursuer would have sustain-
 ' ed had the defender not taken possession of the vessel, and the
 ' amount of the loss and expense occasioned to the pursuer after
 ' the defender's interference, must be ascertained by a careful
 ' examination of those parts of the proof which relate to this
 ' subject, and by such other steps as may still appear to be ne-
 ' cessary in order to determine this point, if farther steps for
 ' this purpose shall seem requisite ; and, before farther answer,

'appointed the parties to give in memorials on this point of the 'cause.' And thereafter his Lordship adhered. March 8. 1826.

Logan reclaimed, but the Court adhered.

The case then returned to the Lord Ordinary, when the result was a report by Mr Menzies, ship-builder in Leith; and the Lord Ordinary pronounced judgments finding Logan liable to the pursuers, 1st, In the balance of L.456. 18s. 8d. with interest from the 18th February on L.265. 2s. 2d. being the balance of principal sum due at that date; 2^d, In the expenses incurred in the Admiralty Court prior to the 12th March 1812, viz. L.384. 11s. 4d. and the expenses of extracting the Admiralty Court decree, amounting to L.185. 19s.; but found him not liable in any other expenses incurred in the Admiralty Court, nor in interest on any part of the above-mentioned expenses: found him liable in the pursuer's expenses in the Court of Session, viz. L.355. 15s. 6d.; and in the suspension at the defender's instance found the letters orderly proceeded; and in the reduction at his instance repelled the reasons of reduction; and reduced and decreed in terms of the pursuer's reduction, in so far as supported by the interlocutor in the cause.

The pursuers represented to the Lord Ordinary, that they were entitled to interest on the sum paid for extracting the Admiral's decree. The Lord Ordinary so far altered his interlocutor as to find the defender liable in interest on that sum; and the Court, on the 14th November 1821, adhered to that judgment. There were several other proceedings on the point of interim payments and expenses, which need not be detailed.*

Logan appealed from four interlocutors of the Judge-Admiral, and twenty-three interlocutors of the Court of Session.

Appellant.—The appellant claims no salvage or money expended by him; but he appears as defender to an action of damages against him, for carrying the vessel he had a right to take the custody of, into one port rather than another. This is the first instance in Scotland or England of an action against a bona fide salvor for injudicious conduct; for here there is no charge of wilful misconduct or of appropriation. The appellant took possession solely for behoof of the owners; and he did so under his right. His charters contain a clause of 'wrack, wair, 'et waith;' and the vessel was within the jurisdiction over which his charter extends:—

* See I. Shaw and Ballentine, No. 225. and 278.

March 8. 1825.

Lord Gifford.—Not when the vessel was first discovered by the respondent.

Keay.—We maintain that she was within the headland of Luce, which is within his jurisdiction. By the law of Scotland the appellant held a right to take possession of wreck, whether on shore or at sea. He and his predecessors had acted under this right, and had held Admiralty Courts in the exertion of their rights, minutes of proceedings in which are in process. The right was acknowledged in the Judge-Admiral Court by a judgment in 1791, bearing, that Logan had 'established a right to 'the droits of Admiralty upon the shores of his land and barony 'of Logan.' It is not necessary that this grant should be in the dispositive clause of the charter. It is in the tenendas, and has been followed by possession; and that possession has been confirmed by a competent Court. Besides, the Crown does not dispute the appellant's right, and a third party cannot. To whom does a wreck at sea belong in this situation, if she does not fall within the droits of Admiralty? Surely not to the first occupant.

Lord Gifford.—The respondent does not argue that he has any right of property, but merely that he was the first salvor, and was improperly disturbed by the appellant.

Keay.—But he adds, that the appellant was desirous of appropriating to himself the property; and maintains, that he, the respondent, without any grant, could exclude the appellant, who holds a grant of 'wrak, wair, et waith,' and has over and over again exercised it. The vessel was a derelict; for dereliction ensues upon the desertion of the real owner: she continues a derelict even in the custody of the salvors; and in whosoever's hand she may be, the crown, and the crown's donor, can take her. Observe what is the extent of a salvor's right: If a merchantman is the salvor, the crown sends a person on board to take possession. Could the salvor say, 'No; I shall keep 'possession, and carry the vessel 100 miles off?' Certainly not. Besides, the appellant was entitled to act as he did, in virtue of the statute of 12. Anne, c. 18. He being a Justice of Peace, he acted with perfect bona fides; and quomodo constat that, had the vessel been taken to Drummore Bay, the same or worse consequences might not have happened?

Interest ought not to have been allowed upon the expense of extract.

Respondent.—The appellant was not justified in dispossessing the respondent, who had taken possession, and held for the owners. The respondent claimed no right of property, but to

bring the vessel into a place of safety; and this right he had a title to maintain. The appellant's charters give, at best, but a right to wreck; and here the vessel was riding out at sea, at anchor, with a competent crew on board. The appellant's right, such as it is, never extended farther than to wreck cast on shore; such a grant does not comprehend the powers and jurisdiction of Admiralty. But the right is not in the dispositive clause, where it ought to be. It cannot be considered as confirmed by the proceeding alluded to, and certainly is any thing but borne out by the minutes, which, if they substantiate any thing, shew that the appellant's ancestors claimed the right of property and enjoyment in the wreck; as they bear, that train oil and rum having been cast on shore, (17th January 1746), 'I sold the oil at Glasgow, and drank the rum at Logan, being decerned to be mine at my Admiralty Court;' a court which he had no title to erect. The appellant had not the shadow of pretext for interfering with the vessel at all, and much less for dispossessing the salvors. *Bona fides* will not save him, even if he could plead it. The party who thus without title intruded himself, must suffer rather than the owners. The vessel was beyond his jurisdiction; and even if she had been nearer, he, having exposed her to damage, must be liable. Neither was he called on to act in the character of Justice of Peace. The statute of Anne does not support his defence. The damages have been calculated most favourably for the appellant. As to the interest on the expense of extract, that expense had been incurred, and the amount paid; and interest on it followed as of course.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed with L. 150 costs.'

My Lords,—In this appeal Andrew M'Douall, Esq. of Logan, is the appellant, and Alexander M'Dowall, for himself, and as agent and manager for the owners of the brig Lord Nelson and her cargo, is the respondent. This is an appeal against a great number of interlocutors of the Court of Session, finding the appellant liable for the injury which was sustained in the transaction, to which the case refers, by his acts.

My Lords,—It appears that on Saturday the 17th of November 1810, a vessel, which afterwards proved to be the Lord Nelson, was discovered by the respondent, Mr Alexander M'Dowall, in great distress, about five or six miles from any shore, at a still greater distance, as it is stated, from the estate of the appellant, and near to a reef of rocks called the Big Leaves, which is situated near the mouth of the

March 3. 1825. Bay of Luce. It appears that the respondent prevailed on Captain Hannay, the master of a sloop called the *Druid*, which was at that time lying in the harbour of Drummore, to go out to the assistance of this vessel, and take her in tow and bring her into the harbour of Drummore. It appears also that Captain Hannay was under some fear respecting his own vessel, but that at length he consented, and accordingly did go out; and that, on approaching the vessel in question, he discovered her to be water-logged, having suffered considerable damage in her masts and rigging. At that time he saw no person on board of her, and had every reason to think that her crew had either deserted her or had perished. It appears that Captain Hannay was at that time, from the state of the weather, unable either to board the *Lord Nelson*, or to take her in tow; he therefore returned to Drummore after having accurately observed her condition.

My Lords,—It appears that another attempt was made by the respondent himself in a row-boat, with five or six experienced sailors, to assist this vessel, but that also was ineffectual: however, on the following morning, the 18th of November, very early, the respondent, with some persons in his employ, went out, and they were at that time enabled to get on board this vessel, the *Lord Nelson*. They found her at that time without any crew on board. They endeavoured to bring her into the harbour of Drummore; but, from the state of the weather, were unable to accomplish this: they therefore felt it prudent to bring the vessel to an anchor, which they did at a distance of about two miles from the shore, off a place called the Windmill of Logan, or the Point of Balgowan, which is stated to be near the northern extremity of the appellant's property. The respondent having seen her safely at anchor, left her in the charge of certain persons, and came ashore.

My Lords,—I will here remark, that no doubt can be entertained of the bona fides of the conduct of this party; for it appears, that very soon after he came ashore he gave notice to the nearest custom-house officer of the stranding of this vessel; and there being no crew on board, and there being no means of ascertaining who were the owners, he the next day communicated the particulars by a letter to Lloyd's coffee-house.

My Lords,—It appears, that while the brig was riding at anchor off the point of Balgowan, late on the evening of Sunday the 18th, the appellant, Mr M'Douall, who is a gentleman resident at Logan, in that neighbourhood, hearing of the state of the vessel, issued what he is pleased to call a warrant, about the accuracy of the copy of which there has been some discussion in the Court below, in which he says, —'Whereas I am informed there is a dismasted ship floating off the Point of Balgowan; I therefore grant warrant to Alexander M'William and John Scott, both my servants, to go and take charge of the said ship, and carry her into the nearest place of safety, or to Chapelrossan Bay, for behoof of the owners or insurers, and to employ

‘ what men they may see necessary to assist them, and to discharge
 ‘ any that may disobey these orders, or act improperly, and report the
 ‘ same. This I do on the 18th of November 1810, as Admiral and
 ‘ Justice of the Peace.’

March 8. 1825.

My Lords,—It appears, that under this authority the persons named in it, and others, went out and boarded this vessel, which was at the time in the possession of the persons left in charge of her by the respondent; and without detaining your Lordships by going through all the circumstances, the result, I think, may be fairly stated to be, that the appellant retained possession of the vessel, and the respondent was obliged to withdraw from her. The respondent had been desirous of getting her into the harbour of Drummore, which was the best place of security to which she could be carried; and, by the assistance of the Druid, he was in hopes of being able to effect that; but, on the appellant taking possession of her, he endeavoured to remove her into Chapelrossan Bay, or some bay in the neighbourhood, notwithstanding, in consequence of the Druid having gone out to her assistance, she might have been, as the respondent contends, safely brought into the harbour of Drummore. She appears at length to have drifted into the Bay of Chapelrossan, which is on the shore of the appellant's estate, which is stated to have been an open bay, and with a very bad bottom. She was dragged on shore; and shortly after there was another step taken, by which it is stated that she received a very considerable damage, a dock or canal being cut for her in the sand, and on which, on the approach of the high tide, she drifted and rolled.

My Lords,—It appears that, shortly afterwards, the agent for the owners of this vessel dispatched a letter to the respondent, authorizing him to act in their behalf, and to do all in his power for the preservation of the vessel and her cargo. This, it appears, he immediately communicated to the appellant; but he refused to give up the vessel to him, and ultimately proceedings were instituted in the Admiralty Court for the restitution of the ship and cargo, and for the damages sustained in consequence of the interference of the appellant. In consequence of those proceedings, the ship and cargo were delivered, upon security being given for the salvage which might be found due to him, and the respondent proceeded merely in the question for damages.

My Lords,—It is not necessary to detain your Lordships with a great variety of proceedings which subsequently took place, the result being, that ultimately it was found by the Court of Session that the appellant was liable in a considerable sum to the owner, for damages the vessel had sustained by what they alleged was a misconduct on the part of the appellant, in his improperly taking possession of the vessel, and conveying her into this place. His defences were several:—1st, He contended he had a right, in consequence of certain charters which he possessed, to take possession of this vessel as a derelict, which this vessel certainly was; that he was therefore fully justified in taking

March 8. 1825. possession of her from the respondent, Mr M'Dowall; 2dly, He contended, that if he had not that right, he was justified in interfering in his character as a Justice of the Peace; and, lastly, It was contended, that even if he failed in both those defences, he ought not to pay damages, because he acted bona fide.

My Lords,—With reference to these different defences, his titles are stated shortly. He founds chiefly on a charter granted by John M'Douall of Logan in 1594. By that, certain lands were erected into the barony of Logan; and which charter contained a general clause, granting to him the privilege and liberty of the forest, vert and venison, and so on; and then follow these words,—‘ wrack, wair, et waith.’

My Lords,—A considerable discussion took place below, and at your Lordships' Bar, on the construction these words ought to receive, and also upon the validity of this grant, supposing these acts were capable of a construction which the appellant contended for, in consequence of these words occurring in a clause of the charter called the tenendas clause, and not in the dispositive clause.

My Lords,—He also founded on what he called the record of the proceedings in the Admiralty Court, which was a book, or rather, indeed, detached pieces of paper, in which there were proceedings in this supposed Admiralty Court of Logan, and from which the defender contended, it appeared, that he had enjoyed the right of taking wreck on the shores of the barony of Logan; and there was one entry particularly referred to, from which it appeared that rum and oil, which had been taken up on the shore of this barony, had been condemned for his use; and he shewed that he enjoyed this property, for that he sold the oil at Glasgow, and drank the rum at Logan. He also founded on a judgment in the year 1791 in the Admiralty Court, in which it was found, that the defender, John M'Douall, Esq. had established a right to the droits of Admiralty upon the shores of his lands and barony of Logan. Under all these circumstances, he contended, that notwithstanding this vessel had been, as must be admitted on all hands, legally taken possession of by the respondent, not as claiming the property, for neither he nor the appellant could establish any right, or sustain any claim to the property, against the right owner; but that, having legally taken possession of it for the benefit of the owner, he was entitled to the salvage for the trouble he had taken in taking possession and keeping possession of this vessel for the benefit of the owners. The appellant contended, that although the respondent had legally taken possession of this vessel five or six miles from the shore, and was taking care of it for the owner, he had a right to divest him of the ownership, and to retain the possession for the benefit of the owners, or for his own benefit if no owner appeared. My Lords, The Court of Session were of opinion, that this supposed grant, and the subsequent proceedings upon it, gave him no such right; and, upon the best consideration I have been able to give, it appears to me they have formed a perfectly

right judgment. My Lords, leaving out of consideration the question of the appellant's right to hold this Admiralty Court, this subject, when first she was discovered, was five or six miles from the shore, at the entrance of the Bay. It is very doubtful whether she was at that time opposite that part of the shore which this gentleman considers as included in his barony of Logan; but, my Lords, when he divested another of the possession, it was incumbent upon him to prove satisfactorily a title to divest him,—that he had a right to divest the person who was in possession for the benefit of the owners, and who was only intending to preserve the property for their benefit. But really it is ridiculous to talk of his Admiralty Court, when I tell your Lordships that his evidence consisted merely of loose memorandums, from which it appeared certainly that he had applied to his own use certain property found on the shores of Logan, and when I state that this vessel was not a wreck. It is true that, having no crew on board, she fell within the denomination of a derelict, to which the Crown would have been entitled if no owner had appeared, and which would have justified any person in taking possession of her for the benefit of the owners, or of the Crown.

March 8. 1825.

But, my Lords, independently of the question, whether this gentleman was entitled to interfere in his character of Admiral, which, in the present situation of this cause, I think he has not brought any thing like the sort of evidence which he must, in order to support and justify the conduct which he pursued on this occasion, he endeavoured to shelter himself under his character of a Justice of the Peace. The statute under which he contended he had this right of interference, was the statute of Anne. It is quite evident in this case, that no proceedings had taken place under that statute to call for his interference as a Magistrate, and therefore his justification as a Magistrate entirely failed.

Then in his defence he urged at your Lordships' Bar, that though he had no right to interfere in his character of Admiral, or as a Magistrate, still he acted bona fide, and therefore it was extremely hard he should have to pay the damages which were given against him by the Court.

On that subject I will not detain your Lordships by going through the evidence in this case. It appears that this vessel was in the possession of the respondent, and his men, who were using all their efforts to carry this vessel into the harbour of Drummore; and who were very desirous to carry her into the harbour of Drummore, where she might have been in safety, and which appears to have been the best place in that neighbourhood for the reception of this vessel. This gentleman, however, chose to take her out of the respondent's hands. There were difficulties, I admit, in carrying her into that harbour; but it appears it might have been effected, had not the respondent been obliged to give up the possession of the vessel. He chose to carry her to Chapelrossan, where, as they have stated to

March 8. 1825. your Lordships, she ultimately received very considerable damage, for the amount of which this sum has been awarded against him. And, my Lords, I cannot help conceiving, (speaking for myself), that though this gentleman might be actuated by a desire to preserve this vessel for the benefit of the owners, he took this part also for the sake of the benefit of the salvage he might obtain. Under these circumstances, I think he is precluded from saying, he is not subject to the damage which has accrued in consequence of his acts. To the amount of those damages very little was said at your Lordships' Bar, and it is not my intention to trouble your Lordships with any observations upon their amount. They have been ascertained as nearly as they can be in a case of this sort. It is admitted, that this was a case probably of the first impression; for in this case the appellant is not claiming salvage, but only endeavouring to protect himself from the consequences of his liability for the loss which has accrued.

My Lords,—This case has been frequently under the consideration of the Court of Session; having been first under the consideration of the Judge-Admiral, who awarded against this gentleman damages and expenses. The Court of Session then pronounced seventeen or eighteen interlocutors against which this appeal has been brought. The result of the opinion I feel it to be my duty to express to your Lordships is, that those interlocutors were right, and that this gentleman had misconducted himself, so as to render himself liable in damages, and to the amount of damages awarded against him. Seeing no reason to find fault with the decision of the Court of Session, it does appear to me that, in affirming this judgment, your Lordships ought also to affirm it with costs. It appears to me, that all the grounds of his defence have entirely failed. The Court of Session have been of that opinion; and if your Lordships concur with me in the opinion that they were right in their conclusion, it does appear to me, that, under those circumstances, this gentleman ought to pay costs for bringing this case before your Lordships. I will therefore move your Lordships, that this interlocutor be affirmed with L. 150 costs.

Appellant's Authorities.—Ersk. Inst. 2. l. 13; M'Kenzie's Observ. on 1429, c. 124; Laws of Olaron, § 29, 30.; Skene de Significatione, voce Wreck; Craig, 1. 16. 42.; Stair's Inst. 3. 3. 27.; Balfour, p. 623.; Bank. Inst. 1. 8. 209.; 4. 12, 18.; 12. Queen Anne, c. 18.; Com. of Customs, May 25. 1810, (F. C.); Robinson's Reports, Case of the Aquila.

Respondent's Authorities.—Aboyne v. Farquharson, Nov. 16. 1814, (F. C.); (House of Lords, April 22. 1818); Stair's Inst. 3. 3. 27.; Bankton, Inst. 1. 8. 6.; Connery v. Lord Dundas, Feb. 1. 1805, (App. 1. Jurisdiction, No. 14.); 1429, c. 124. with M'Kenzie's Observations; 12. Anne, c. 18. 1.; 26. Geo. II. c. 19.

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors,

ALEXANDER HAMILTON, Appellant.

No. 6.

JAMES RICHMOND and Others, Trustees of ANDREW LINDSAY,
Respondents.

Oath—Loan.—Under a reference to the oath of party, whether a certain sum of money had been advanced in loan, found, (affirming the judgment of the Court of Session), That the oath did not prove that the money had been advanced in loan, and therefore the defender was entitled to absolvitor.

HAMILTON raised, in the Sheriff-Court of Ayrshire, an action against Lindsay, for repayment of L.190, alleged to be the amount of a loan made by Hamilton to him. Lindsay insisted that it was not a loan, and denied that he ever promised to pay it. In the course of the subsequent proceedings parole proof was adduced as to the fact, and the declaration of Lindsay taken. The Court of Session, before whom the case had come by advocacy, in respect the libel concludes ‘for payment of a sum of money, alleged to have been given in loan to the defender, which was not capable of being proved by witnesses,’ assolizied the defender, without prejudice to Hamilton insisting in any other action which he might be advised to raise, and reserving to Lindsay his defences.

March 8. 1825.

2D DIVISION.
Lords Reston
and Cringletie.

Hamilton having raised a new action, Lindsay alleged *res judicata*; denied that he had borrowed the money; and stated, that it had been put into his hands with the view to retire a bill, so as to enable Hamilton to be elected trustee on a sequestrated estate for which there was a competition. The Lord Ordinary, ‘in respect of the judgment in the former action, and that the pursuer makes no reference to the oath of the defender, sustained the defences;’ and on advising representation and answers, adhered. Hamilton petitioned for alteration, or at least to be allowed to put in a special condescendence of the facts and circumstances alleged by him, and that the answers thereto might be subscribed by Lindsay himself. Thereafter the case having been taken up on condescendence and answers, their Lordships, on the 21st January 1820, refused the petition, and adhered to the interlocutor complained of: found Lindsay entitled to expenses since the date of the first interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary to receive a reference to oath.

By a minute of reference Hamilton offered to prove, 1. That in the beginning of January 1812, John Deane, writer in Kil-

March 8. 1825.

marnock, held a bill, drawn by James Boreland, upon and accepted by Lindsay and James Richmond; and that this bill, with the interest then due upon it, amounted to about L.190. 2. That in consequence of the bankruptcy of the acceptor Richmond, the defender Andrew Lindsay having become liable to pay the full amount of this bill and interest, had sundry conversations with Hamilton upon this subject; in the course of which he stated, ' that he had received some notice or hint, that ' he would soon be called on by Mr Deans to relieve this bill, ' but that he had no funds provided for this purpose. 3. That ' in consequence of this arrangement, the defender, Andrew ' Lindsay, came to the house at which the meeting of Richmond's creditors for electing the trustee on his estate was to be ' held; and on the forenoon of the day of the election, the pursuer met with him in a room of this house, and had the sum of ' L.190 ready to deliver to him, on the footing above explained; ' but before he had given the money to the defender, he was suddenly called out of the room upon particular business. A few ' minutes afterwards, Mr John Gregg, of Greenock-Mains, came ' to him for the money, and the pursuer being particularly engaged, gave Mr Gregg the sum of L.190 to deliver to the defender, who, after counting it, went to Mr Deans and retired the ' bill above-mentioned;' and this was afterwards amended by ' saying, that the pursuer agreed to accommodate the said defender, Andrew Lindsay, for a short time with a loan of money ' for this purpose,' that is, for payment of the bill. Lindsay deponed, ' That he was joint acceptor of a bill along with ' James Richmond to James Boreland for L.166, or L.167 ' sterling of principal, besides interest, and which bill was ' granted before Richmond's bankruptcy: That after James Boreland's death, his son and widow had some dispute about the ' succession to the property, and the bill was put, at least the ' deponent knows that it was in the hands of John Deans, writer ' in Kilmarnock, at the time the deponent paid it in Mauchline: ' That he does not recollect the period when James Richmond ' became bankrupt, but he recollects of a meeting of his creditors ' at Mauchline for the purpose of choosing a trustee on his estate, ' and which meeting the deponent attended: That the deponent ' was not ranked as a creditor on Richmond's estate: That the ' deponent was not asked to attend that meeting by any person, ' but went there from curiosity, and to look from him: That the ' pursuer did not ask him or forbid him to attend that meeting: ' That the deponent went into the room where Mr Deans was,

March 8. 1825.

‘ where he remained about two minutes, and was sent for to the
‘ room where the pursuer and others were; but he cannot say
‘ how long he remained in that room: That while in that room
‘ the pursuer three different times offered the deponent money to
‘ retire the bill before-mentioned from Mr Deans, and this he
‘ did by holding out a bundle of notes, and telling the deponent
‘ it was for that purpose, all of which times he refused the money:
‘ That the evening before the election of trustee, the pursuer
‘ called upon the deponent, at his own house, about nine o’clock
‘ at night, and wished him to retire the bill before-mentioned,
‘ and to give it to the pursuer, as he supposed, for supporting
‘ his interest as trustee, to which the deponent then said that it
‘ was not convenient to advance the money, to which the pursuer
‘ answered, that he would assist the deponent to retire the bill:
‘ That the day of election, and after the pursuer had offered
‘ three times to lend him money to retire his bill, on the last of
‘ these occasions the pursuer left the room as fast as he could,
‘ and some others followed him: That there remained in the room
‘ with the deponent William Wallace in Moosback, William
‘ Wylie in Brigland, William Allan then in Wallacetown, John
‘ Gibbie of Middlethird, and James Richmond, the bankrupt:
‘ That shortly after the pursuer had left the room as above,
‘ John Gregg, then in Greenock-Mains, came into the room
‘ where the above persons and the deponent were: That the de-
‘ ponent did not see John Gregg, either in the house or out of it,
‘ that day, before he came into that room as above: That Mr Gregg
‘ took two of the persons present as witnesses that he would lend
‘ the deponent money to retire the above bill, to which the de-
‘ ponent answered, that he would borrow money from him nor
‘ no man to retire the bill, as he was not going to do it at the
‘ time: That John Gregg pressed the money on the deponent,
‘ but which the deponent refused, and gave him the same answer
‘ as before: That Mr Gregg took out a bundle of notes, put them
‘ into the deponent’s hands, and desired him to go and retire his
‘ bill, take it home with him, and keep it, for that he the depo-
‘ nent would never be more troubled with it: That when Mr
‘ Gregg came into the room as above, he had the money in his
‘ hand as he supposed, at least the deponent observed a bundle
‘ or parcel in his hand. Being specially interrogated, depones,
‘ That he did not know, and could not believe that the money
‘ Mr Gregg gave him as above came from the pursuer, as twelve
‘ hours before that the pursuer told him that he had not the
‘ money, otherwise he would have made Deans give up the bill:

March 8. 1894.

‘ That the offer which the pursuer made three times to the deponent in Murray’s inn, and which he three times refused, was the day following that upon which the pursuer made use of the expression as above. Being specially interrogated, if when Mr Gregg came into the room, and offered the deponent the money; which he afterwards accepted of, did he or did he not believe it was the money of the pursuer? depones, That he took no thought about them, and cannot say ay or no to the question: That before Mr Gregg gave the deponent the money as above, he had not spoken to him for some years. Interrogated, if when he received the money from John Gregg as above, the deponent conceived he was under an obligation to Mr Gregg or the pursuer? depones, That the deponent considered he was under no obligation either to the pursuer or any other man: That he never had any dealings with Mr Gregg before: That he retired the bill from Mr Deans before he left the inn. Interrogated, if in any of the conversations the pursuer had with the deponent about assisting him in advancing money to retire the bill, did he the pursuer ever give the deponent to understand, that he was to give the deponent a present of the money? depones, That he never did: That he never said to any person that he borrowed money from the pursuer to retire the bill. And being interrogated, if the deponent did not say to James Merry, cooper in Mauchline, that he had borrowed money from the bailie (meaning the pursuer) to retire the bill from Mr Deans? depones, That he never did say so to him or any other person. Interrogated farther, if, since he got the money as aforesaid, he ever expressed his wish to borrow a sum of money to repay the pursuer, or that he was on the look-out for money for that purpose? depones, That he never did: That he did not vote in the election of trustee on the above occasion: That when the pursuer called on him in his house at Mauchline, on the night before the election, and offered to assist him to retire the bill, the deponent said he would advise upon it. Interrogated, whether he did or did not understand, that the money which he admits to have received from John Gregg was given in loan? depones, That he understood the money was given him by Mr Gregg to get the bill from Mr Deans.’

Parties were heard upon the import of this oath, and the Lord Ordinary pronounced the following interlocutor:—‘ The Lord Ordinary having, on the 14th instant, heard parties’ procurators on the import of the defender’s deposition, and whole cause, and having since advised the whole, finds that the de-

' fender, with James Richmond, late of Auchincloch, granted a March 8. 1825.
 ' bill for about L.166 to James Boreland in Burnaan, which,
 ' after the death of the last, came into the hands of John Deans,
 ' writer in Kilmarneock: That James Richmond having become
 ' bankrupt, and his estate having been sequestrated, a compe-
 ' tition took place for the office of trustee for his creditors, for
 ' which the pursuer was one of the candidates. Finds, that the
 ' pursuer wished and urged the defender to retire from Deans
 ' the said bill, probably believing that Deans would vote against
 ' the pursuer, and would not therefore part with the bill till after
 ' the election, unless he was required so to do by one of the
 ' acceptors, who had right to retire it. Finds, that the pursuer,
 ' on the night before the election, offered to accommodate the
 ' defender with money, with which he might retire the bill, which
 ' offer was not accepted; and on the day of the election he re-
 ' peated that offer three times, which was as often refused.
 ' Finds, that after this, on same day, the pursuer, by his own
 ' admissions, sent John Gregg, then in Greenock-Mains, to the
 ' defender again, to offer to him money wherewith he might retire
 ' said bill, which Gregg, in presence of witnesses, offered to lend
 ' to the defender for that purpose, and which the defender again
 ' refused, telling Gregg that he would borrow money from him
 ' nor no man to retire his bill, as he was not going to do it at
 ' the time. Finds, that on this Gregg gave the defender the
 ' money, and advised him to go and retire his bill, take it home
 ' with him, and keep it, for the defender would never more be
 ' troubled with it; and that the defender did accordingly retire
 ' said bill. Finds, that in one part of the defender's deposition,
 ' in answer to a question whether he thought himself under an
 ' obligation to the pursuer or to Mr Gregg for the money, he
 ' deponed, that he considered himself under no obligation to the
 ' pursuer, or any other man; and, in another part, in answer to
 ' a question, whether the pursuer gave him to understand that
 ' he, the pursuer, was to give the defender a present of the
 ' money, the defender deposed that he never did; and, lastly,
 ' being interrogated whether he did or did not understand, that
 ' the money which he admits to have received from John Gregg
 ' was given in loan, the defender depones, that he understood
 ' that the money was given to him by Mr Gregg to get the bill
 ' from Deans. Finds, that from the combination of these diffe-
 ' rent passages of the defender's depositions, that the true import
 ' of the whole is, that the defender did not only not agree to
 ' accept of the loan from the pursuer, and become bound for it

March 8. 1825.

‘ to him by an obligation to repay it, separate from and independent of said bill, but did positively refuse to receive such a loan; and that the purpose for which the money was advanced was, that he should retire the bill, and thereby prevent Deans voting on it against the pursuer in the election of a trustee on Richmond’s estate. Finds, that in the course of the pleading it was stated for the defender, and not denied by the pursuer, that the said bill, when retired, was discovered to have been written on an improper stamp, and was therefore null, and had never been demanded to be given up by the defender to the pursuer since it had been retired, which fact of its nullity must have been probably unknown at the time the bill was retired. Finds, therefore, that this action is a plan devised to render the defender liable for the money due by said bill, by means of an alleged separate loan positively denied by the defender, and therefore assoilzies him, and decerns. Finds him entitled to expenses, the taxation of which remits to the auditor of Court, reserving to the pursuer, if he shall be so advised, to demand delivery of said bill from the defender, and payment of its contents, as accords.’

The defender, Lindsay, died before a representation against this judgment was advised. The process having been transferred against Lindsay’s trustees, the Lord Ordinary pronounced this interlocutor:—‘ The Lord Ordinary having advised this representation, and considered the state of the process, as now wakened and transferred, sees that the fact alleged by the defender at the pleading, viz. that when the bill in the hands of Deans was retired, it was found to be written on unstamped paper, and thereby void; and as it appears to the Lord Ordinary, that the true purpose of advancing the money to the defender was to enable him to retire that bill, which would in all probability have been demanded from him if it had been worth demanding, and not to establish a debt against him independent of that bill; and that it would be unjust to make him pay a debt indirectly, when he was not liable for it directly under the bill; of new refuses this representation.’ Hamilton petitioned; but the Court, on the 23d of January 1823, adhered.*

The Judges were of opinion, that although the precise nature of the transaction did not clearly appear, yet, as the pursuer had not proved a loan, he could not succeed in his action.

Hamilton appealed.

* See 2. Shaw and Dunlop, No. 134.

Appellant.—The facts are established which prove that Lindsay knew that the money was given to him by the appellant in loan, and not as a donation. But even had that not distinctly appeared, it must be held to be in loan, and not in donation. Donation is never presumed, and here it is not even alleged. The money was not given either to oblige Lindsay to pay a debt not directly exigible, nor to procure his vote. March 8. 1825.

Respondents.—It is not maintained that the money was a donation. The loan libelled has been disproved. Instead of the appellant having substantiated any obligation to repay this money, it has been proved that the appellant, when the money was advanced, came under an express obligation that Lindsay should be no more troubled with the debt.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of be affirmed, with L. 100 costs.

Appellant's Authorities.—Stair, Inst. 1. 8. 2.; Bankton, Inst. 1. 9. 20.; Ersk. Inst. 3. 3. 92.; Mor. Dict. 1151.; Fount. Dec. vol. ii. p. 172. 644.; Ross v. Fidler, Nov. 24. 1808, (F. C.).

J. RICHARDSON—J. CAMPBELL,—Solicitors.

JAMES DUKE OF ROXBURGHE, Appellant.—*Denman—Keay.* No. 7.

JAMES WAUCHOPE, W. S. Trustee, and Others, residuary Legatees of John Duke of Roxburghe, Respondents.—*Sol.-Gen. Hope—Sandford.*

Et c contra.

Tailzie—Bona Fides.—An heir of entail in possession having redeemed a wadset, (part of the entailed lands, and wadsetted under powers in the entail), by taking an unconditional discharge and renunciation, containing a procuratory of resignation ad remanentiam, which he, as superior, executed in his own hands; and having, on the supposition that he held it in fee simple, disposed the wadset to a trustee mortis causa; and the trustee having drawn the rents of the wadsetted lands for several years without objection, and paid the same to parties having right under the trust, by whom they were consumed;—Held, (affirming the judgment of the Court of Session), 1. That the wadset right was thereby extinguished, and did not remain a separate estate or right in the person of the reverser, which he could convey to his heir-at-law; and, 2. That both the trustee, and parties to whom the rents were paid, were protected by bona fides from repetition.

In 1662 William Earl of Roxburghe, in virtue of powers under an entail executed by Earl Robert in 1648, granted a wadset right over the lands of Wester-Grange, and other parts March 9. 1825.
1st DIVISION.
Lord Alloway.

March 9. 1662. of the entailed estate, in favour of William Davidson in Grubet, in security of the sum of 6650 merks, which had been owing to him by Earl Robert. By this wadset Earl William sold, annalzed, and disposed to the said William Davidson, 'all and 'hail these five husband-lands of Burnyards and Wester-Grange,' &c. during the non-redemption, to be holden of the Earl and his heirs in feu-farm; and on the other hand, William Davidson obliged himself 'to make, seal, subscribe, and deliver 'to the said Earl, and his heirs-male and of tailzie succeeding 'to him in the said lands and earldom of Roxburghe, ane sufficient letter of reversion for redemption of the said lauds, teinds, 'and others above-written, containing thereintill the said sum of '6650 merks;' to be paid and delivered in manner therein mentioned. The contract also contained a clause, discharging all personal suit or execution against the Earl, his heirs and executors, or the heirs and executors of Earl Robert, for payment of the sum in the wadset, without 'prejudice always to the 'said William Davidson and his foresaids to make use of the 'samen contract provision of the said taillie and assignation, for 'securing to them of the lands, teinds, and others above-written, 'hereby wadset to them, by any manner of way agreeable to the 'laws and practice of this realm.'

Of the same date Earl William granted a bond of eik in favour of William Davidson, for the further sum of 3850 merks, being the amount of a separate debt due by Earl Robert and his son Harry Lord Ker. By this bond this sum was added to the redemption money, and the right of reversion suspended until this sum, and interest thereof, was paid, in addition to that already mentioned.

Under this right, followed by infestment, Davidson and his heirs possessed until 1764, when John Duke of Roxburghe, the heir then in possession of the entailed estates, resolved to avail himself of the right of reversion, by paying to Cockburn, (who was infest as trustee under a trust-disposition from Thomas Davidson, the heir of William, for behoof of his creditors), the original wadset sum, as well as the amount of the eik. With this view Duke John consulted Counsel as to the influence which the circumstance of being heir of tailzie could have on the transaction; and received in answer,—'Though 'the Duke, as heir of entail, may not be liable to the debts and 'deeds of Earl William, granted by the wadset 1662, and takes 'the reversion as heir of entail, he must take it cum suo onere; 'whereof this is one, that the wadsetter be relieved of the minis-

ter's stipend. But it is proper that his Grace should know; March 9. 1688.
 that when he shall have redeemed this wadset, and taken a re-
 conveyance or renunciation of the same, in favour of himself
 and his heirs of tailzie, they will not be subjected to the fetters
 of the entail, or inalienably consolidated therewith, unless a new
 deed of entail of these is executed.

The redemption was then effected in this manner:—Duke John took a renunciation, which, after reciting the original creation of the wadset, bore, ‘ And now seeing his Grace John Duke of Roxburghe, heir of tailzie by progress to the said deceased William Earl of Roxburghe, granter of the wadset and bond of eik above narrated, has by the hands of Henry Balcanquhal, writer in Edinburgh, made payment to me, the said Thomas Cockburn, as trustee foresaid for the use and behoof of the creditors of the said Andrew and Thomas Davidson, of the foresaid sums, amounting to L.1798. 14s. ; therefore wit ye us, the said Thomas Cockburn and Thomas Davidson, for our several rights and interests above-mentioned, with mutual advice and consent of one another as aforesaid, not only to have exonerated and discharged, as we hereby exoner, acquit, and simpliciter discharge the said John Duke of Roxburghe, his heirs and successors, and all other heirs and representatives of the said deceased William Earl of Roxburghe, granter of the said contract of wadset and bond of eik, and also the representatives of the said deceased Robert Earl of Roxburghe; and Henry Lord Ker his son, the original debtors in the bond narrated in the said contract of wadset and bond of eik, of the whole sums of money before narrated, now paid to me the said Thomas Cockburn, trustee foresaid, and all contained in and due by the said contract of wadset and bond of eik, and other writs there contained, and of the said writs themselves, and whole clauses and obligations therein contained, and of all actions competent thereupon, and all that has followed, or may follow upon the samen; but also to have renounced, discharged, and overgiven, as we hereby discharge, renounce, and overgive, in favour of the said John Duke of Roxburghe, and his fore-
 saids, all and haill the said five husband-lands of Burnward and Wester-Grange, &c. with all right, title, we have, &c. in virtue of the contract of wadset and bond of eik, and charters and infeftments, and other writs following thereon as aforesaid, with the said whole writs themselves, teinds, and other pertinents thereof, to be duly and lawfully redeemed from us, and freed, purged, and disburdened in all time coming of the re-

March 9. 1825. 'spective sums before-mentioned, contained in and due by the
 'said contract of wadset and bond of eik, now paid to me as
 'aforesaid, in the same manner as if the lands and teinds had
 'never been charged, burdened, or affected therewith.' The
 deed also contained a procuratory of resignation ad remanentiam,
 bearing, 'And, moreover, to the end we may be more effectually
 'denuded of our respective rights in the said lands, we, for our
 'respective rights and interests above specified, with mutual
 'advice and consent foresaid, do hereby make, constitute, and
 'ordain and ilk one of them, conjunctly
 'and severally, our lawful procurators for us, in our name to
 'resign, &c. all and hail the foresaid lands of Wester-Grange,
 'and others, &c. in the hands of the said John Duke of Rox-
 'burghe, or his heirs or successors, or lawful commissioners in
 'their name, ad perpetuam remanentiam, to the effect our
 'right of property thereof may be consolidated with his Grace's
 'right of superiority of the same, and to remain with his Grace
 'and his heirs and successors inseparably, in all time coming.'

This procuratory Duke John executed in his own person. He did not record the renunciation in the Register of Sasines.

On the 5th November 1803 Duke John executed a trust-deed, whereby he made over his whole effects, heritable and moveable, to John Wauchope, writer to the signet; and among these, 'the property or dominium utile of the lands and other
 'heritages after-mentioned, whereof the superiority also belongs
 'to me, but makes part of my tailzied estate, viz. all and whole
 'the five husband-lands of Burnward and Wester-Grange, with
 'houses, buildings,' &c. Some time afterwards the Duke executed, on death-bed, a deed of instructions, by which he directed his trustees to sell the whole subjects contained in the trust,—to invest the residue, after paying his debts and legacies, in the public funds, or in real security in Scotland,—to pay the dividends or interest to his sisters, Ladies Essex and Mary Ker, during their lives,—and at their decease the principal, in certain proportions, to certain individuals.

After the Duke's death Mr Wauchope took possession of the trust-estates, and, among others, of Wester-Grange, and drew the rents as they fell. Duke John was succeeded by Duke William, after whose death a competition ensued for the honours and estates of the family. Pending the litigation a judicial factor was appointed, and entered on the management; but during this period (about ten years) no challenge was made against Mr Wauchope's right, under the trust-deed, to the lands of Wester-

March 9. 1824.

Grange. At length, on James Duke of Roxburghe being preferred, these lands and rents were claimed by him as forming part of the entailed estate. A multiplepinding was then brought by Mr Wauchope in regard to these and certain funds in his possession, in which Duke James appeared; and his Grace having repeated a reduction, the Lord Ordinary, on the 24th of February 1815, found, 'that his Grace John Duke of Roxburghe, in 1764, 'having, in virtue of his right of reversion as heir of entail, 'taken an unconditional discharge and renunciation of the wadset, containing also procuratory of resignation ad remanentiam, 'subscribed by Davidson, the person in right of the wadset, and 'by Cockburn his trustee, and having afterwards executed that 'procuratory of resignation in his own hands, the wadset right 'was thereby extinguished, and did not remain a separate estate 'or right in the person of the Duke which he could convey to 'his heir-at-law, and therefore reduced in terms of the libel;' and the Court, on the 14th December 1815, adhered.*

The case having returned to the Lord Ordinary to decide as to the bygone rents, and Mr Wauchope having stated that he had bona fide paid the greater part of them to Ladies Essex and Mary Ker, his Lordship appointed them to be called as parties; and thereafter ordained 'the defenders to condescend on the 'whole trust-funds, real and personal, of John Duke of Roxburghe, and the past application of the produce thereof, together with the grounds on which they claim to retain or compensate the bygone rents of the lands of Wester-Grange.' And thereafter 'found, that the defenders, the trustees and 'legatees, have no title to retain any part of the funds uplifted by 'them on account of the sum paid by Duke John for the extinction of the wadset of Wester-Grange; but that as this wadset 'was discharged, and the subjects incorporated with the entailed estate, there are no means by which Duke John's trustees can 'claim the sum he paid for extinguishing the wadset, especially 'as he himself, after the wadset had been extinguished, was 'amply repaid for the advance by the additional rent which he 'drew. 2d, That the Duke having conveyed the lands of Wester-Grange to his trustees for the purposes mentioned in the trust, 'and the trustee having entered into the quiet possession of 'these lands in virtue of the Duke's conveyance, and uplifted the 'rents thereof without the slightest challenge until the present

* Vide Fac. Coll. No. 18.

March 9. 1825. 'challenge was brought, the trustee was a bona fide possessor
' for the purposes of the trust; and he accordingly applied these
' rents, as he was bound to do, for the purposes of the trust;
' therefore found, that the trustee is not accountable for the rents
' of these lands to the pursuer until the first interlocutor was
' pronounced by the Lord Ordinary reducing his right. Found,
' that the trustee is accountable to the pursuer for the rents
' from Whitsunday 1815, but for no prior rents uplifted by him;
' and decerned, and remitted to the clerk of the process to make
' up a state of accounts betwixt the parties upon these principles.'
And on advising a representation and answers, adhered, 'for the
' reasons already stated, and also in respect of the decision of the
' Court with regard to the bona fide possession of Crookedshaws
' in this same entail of Roxburghe.' The question being brought
before the Inner-House, their Lordships, before answer, or-
dained Wauchope to lodge in process a state of his accounts,
shewing the funds received, and the application and disposal of
the same. This order Mr Wauchope obeyed; and lodged a
state of the affairs of Duke John, containing a debit and credit
account, enumerating all Mr Wauchope's intromissions, his
receipts and payments, &c. Among the latter were entered,
' Payments to Ladies Ker on interim warrants of the Court of
' Session, whereby consideration was reserved, whether the same
' were to be applied to account of the general liferent of the
' funds provided to them by the Duke's settlement, or towards
' the bond debts due to them—L. 17,000. *Nota.*—The Ladies
' have since been found not to be entitled to a liferent of the
' funds.' Thereafter the Court, on advising a petition and an-
swers, minute and state, adhered, and refused a reclaiming peti-
tion without answers, on the 13th June 1822.*

Mr Wauchope and the residuary legatees appealed from the
judgments finding that the wadset right was extinguished and
did not remain a separate estate, and that they were not entitled
to retention on account of the price of the wadset; and the Duke
appealed from the judgments sustaining the defence of bona fide
perception and consumption.

Wauchope and others, appellants.—(*Wadset*). Although
Duke John, upon paying up the redemption money, took a dis-
charge and renunciation of the wadset, containing also procura-
tory of resignation, he did not thereby render it incapable of

* 1. Shaw and Ballantine, No. 537.

March 9. 1896.

being conveyed by his trust-deed. Even viewing the wadset as a mere burden on the entailed estate of which it was held feu, the same rule must apply as to any other burden bought up by an heir of entail; and it is now fixed law, that if the heir of entail either pays the debts of an entailed estate, or becomes, by succession, the creditor in these debts, no such extinction necessarily ensues. A reverser, redeeming in virtue of his right of reversion as heir of entail, can still preserve the wadset right free from fetters. It is said, that the preservation of the right as a separate right can only be effected by taking an assignation, and that a renunciation extinguishes the right. It is plain, however, that the efficacy of the assignation depends on the intention manifested to keep the right separate, and this intention cannot be denied in the present case. The mere superadding the renunciation and resignation affords no evidence to the contrary. But, independent of this view, the form adopted did in law leave the wadset unentailed, and capable of being again disjoined from the entailed superiority. Properly speaking, a wadset is an actual right to the lands themselves, subject to the privilege of redemption in the reverser, although, no doubt, it has also been viewed as a mere burden. According to these views, different forms of reconveyance have been adopted. In the view of its being an actual right to the lands, it is proper to execute a procuratory of resignation, which vests the reverser with a right to the wadset, considered as a separate and substantive heritable right transferred to him by the wadsetter. In the view of being a burden, the wadsetter executes a renunciation, which, being recorded in the Register of Sasines, reinstates in the reverser the full right of the lands. To meet both views, the practice is, to execute both a renunciation and a procuratory of resignation. This form the Duke adopted; but in doing so he did not merely discharge the wadset; on the contrary, he took a conveyance to it, and this conveyance effected no entail of the wadset even against the future heirs who came to take it, and much less against the Duke, the acquirer; nor could the execution of the procuratory impose fetters. From the circumstance of Duke John being the superior of the wadset, he was enabled to complete a feudal title by resignation in his own hands; but that did not effect an entail of the subjects resigned. It consolidated, but did not entail. Besides, Duke John did not register the renunciation; and the resignation *ad remanentiam* in the hands of the original superior, Duke John, having proceeded in virtue of a procuratory from the sub-vassal Cockburn, and not from the vassal Davidson, was

March 9. 1825.

inept. This resignation may have united the mid-superiority held by Davidson with the entailed superiority, but could not consolidate the wadset with the entailed superiority. The property, therefore, of the wadset continued, until the Duke's death, to be held as a personal right in virtue of the purchase, and free from the fetters of the entail.

Duke of Roxburghe, respondent.—(*Wadset*). Duke John having exercised the power of redemption competent to him as heir of entail, took an absolute discharge of the debt for which the lands were wadsetted; and by which that debt was extinguished. He might have kept it up by taking an assignation or conveyance; but he adopted a different form, and completely extinguished the burden. By the execution of the procuratory in his own hands, the lands were relieved, and the full right to them thenceforth held by Duke John under the fetters of the entail; and consequently they could not be conveyed by the trust-deed to trustees. Correctly speaking, it was not necessary for the extinction of the wadset right to resign *ad remanentiam*. That was effected by the renunciation and discharge. There is no evidence of intention to hold the wadset lands free of the fetters; and as to the opinion of Counsel, it has not been shewn that the Counsel knew that the lands had been previously part of the entailed estate. Cockburn's infestment was merely an infestment in trust, the truster still remaining feudal proprietor. He, therefore, validly could have resigned. But in point of fact, the procuratory was the deed of both Cockburn and Davidson; was executed by them as principals, and each consenting to the deed of the other; and thus the consolidation of the wadset with the entailed superiority was completed.

Duke of Roxburghe, appellant.—(*Rents*). The lands of Wester-Grange came into the respondent Mr Wauchope's hands solely through inadvertence; but that was not, in the circumstances which attended the competition for the honours and estates of the house of Roxburghe, imputable to the appellant. The defence of bona fide perception and consumption is not available to the respondents. Mr Wauchope was merely the trustee, and that defence is not competent to him in that character. In point of fact, the rents are still extant in his hands; for these rents were levied, not for the use of the residuary legatees, (who had no right until after these ladies' death), but for the use of the ladies themselves. But having challenged their brother's trust-deed on the head of deathbed, and thus taken the lands to which they were heirs *alioqui successuræ*, the rents were not paid to

them as liferentrixes, but solely as creditors, which character they also held. Thus they did not consume any part of the fund in dispute. The trustee had therefore merely the duty of accumulating; and he was challenged before the application. March 9. 1825.

Wauchope and others, respondents.—(*Rents*). The trustee acted *optima fide* in taking possession of the lands of Wester-Grange, and drawing the rents; and it is a fixed rule, that *bona fides* protects the party who can plead it from all obligation to restore the fruits of the subjects so possessed during the continuance of his *bona fides*. The distinction attempted to be drawn between the general case of *bona fides*, and the present, is entirely imaginary. The possession of the trustee was, to all intents and purposes, the possession of the parties beneficially interested; and although the funds extant may, in a question among the parties, be considered as a fund *in medio*, they cannot, in a question with the true proprietor of the lands: quoad him, it is the same thing as if the individual interested had, after drawing the rents, invested them in a Bank, from whom certainly the proprietor of the lands could not have reclaimed them. The Ladies Ker claimed both the fee of certain of the trust-lands, the liferent of the other funds conveyed,—and as creditors. The payment to them under order of the Court was made, reserving, for future determination in what manner the same is to be applied, whether to account of their general liferent of the whole funds, or in part of the debt owing to them. The rents of Wester-Grange were included in the amount of the revenue drawn from the trust-estate; and, in point of fact, a sum equal to the whole annual proceeds of that estate has already been paid away to the Ladies Ker. But, in a question with the Duke, that is of no consequence. The rents were percepti, and the parties interested entitled to the benefit of the plea of *bona fides*, equally as if they had individually drawn their respective shares.

The House of Lords ‘ordered and adjudged, that the said ‘original and cross appeals be dismissed, and the interlocutors ‘complained of affirmed.’

LORD GIFFORD.—My Lords, It is my duty now to call your Lordships’ attention to two appeals which were heard in this House a few days since, in one of which his Grace the Duke of Roxburghe is the appellant, and John Wauchope, Esq. W. S. and other persons, are respondents; and the other was a cross appeal, in which Mr Wauchope, and other persons, are the appellants, and the Duke of Roxburghe the respondent.

These appeals are brought for the purpose of submitting to your

March 9. 1825. Lordships' consideration certain interlocutors of the Court of Session, to which, in the course of what I shall have to address to your Lordships, I shall call your Lordships' attention.

My Lords,—The circumstances out of which this litigation has arisen I would now briefly state to your Lordships. It appears that, so long ago as the year 1648, Robert, the then Earl of Roxburghe, executed an entail of his whole estates, comprising in that entail the lands of Wester-Grange, to which your Lordships' attention will be called more particularly presently. He died in the year 1650; and in the month of January 1662, Earl William, who was then in possession of these estates under this entail, granted, in virtue of the power under the entail, what is called a wadset right, extending over the lands of Wester-Grange. That wadset was executed for the purpose of securing a considerable sum of money which had been owing to Mr Davidson by Robert Ker the entailer, and by Harry Lord Ker, his son. My Lords, this wadset subsisted upon the estate till the year 1764, when the late John Duke of Roxburghe wished to redeem this wadset, which, it appears, was then held by a gentleman of the name of Davidson, who had succeeded to it, but who, antecedent to the transaction to which I shall immediately advert, had been under the necessity of transferring this right to a gentleman of the name of Cockburn, as a trustee, for the purpose of paying his creditors, and for the purpose of rendering the surplus, if any, to Mr Davidson himself. My Lords, in the year 1764 his Grace, the then Duke of Roxburghe, wishing to redeem this wadset, it appears that the transaction was entered into between him and Mr Davidson, and Mr Cockburn his trustee, (which it is not necessary for me to state further than in general terms), consisting, on the part of the Duke, of a payment of this wadset; and on the other side, a renunciation, as it is called, of the wadset right; which also contained a procuratory of resignation on the part of Mr Davidson and on the part of Mr Cockburn to the Duke.

My Lords,—It appears, that in virtue of this procuratory of resignation, duly made on the 22d May 1764, Duke John of Roxburghe continued in possession of the whole of the entailed property, and in the year 1803 executed a disposition of his whole unentailed property to the respondents, Mr Wauchope and others, in trust, for purposes to be declared; and in that disposition were contained these lands of Wester-Grange; and the Duke afterwards, in 1804, while on death-bed, duly executed a deed of instructions, by which he directed his trustees to sell the whole subjects contained in the trust, to invest the residue, after paying his debts and legacies, in the public funds, or upon real security,—the interest of which was to be enjoyed by his sisters, Ladies Essex and Mary Ker.

My Lords,—In 1804 John Duke of Roxburghe died, and he was succeeded by Duke William, who, in 1805, was succeeded by Duke James. On the death of Duke John, Mr Wauchope entered into possession of these lands of Wester-Grange, and continued in such pos-

session, and in the receipt of the rents, until the year 1815. In that year, after a competition with respect to the titles of Roxburghe, which had been determined, an action was brought by Mr Wauchope in the nature of an action of multiplepoinding, upon the narrative that, in virtue of a trust-deed by Duke John, he held a variety of property which was claimed by various persons; and the conclusion of that action was, that all these parties should make appearance in the action for their respective interests, in order that he might be enabled to divest himself in favour of those who truly had the right to these subjects. In this action, James Duke of Roxburghe, who, it is stated, had discovered the situation of the lands of Wester-Grange, appeared and entered his claim to them as heir of entail, and to the rents thereof, which had been received by Mr Wauchope since the death of Duke John. In point of form, it was directed by the Lord Alloway, the Lord Ordinary, that Duke James should raise and repeat a reduction of the trust-deed, in so far as it conveyed these lands, which was immediately done.

March 9. 1825.

My Lords,—In consequence of that action of reduction, an interlocutor was pronounced, on the 24th February 1815, by the Lord Ordinary. (His Lordship then quoted it. See ante, p. 45.) A short representation was made against this interlocutor, which was refused by the Lord Ordinary by an interlocutor of the 12th May 1815; and the Lord Ordinary, upon considering a second representation and answers, again adhered by an interlocutor of the 11th of July 1815. These interlocutors were then submitted to the review of the First Division of the Court of Session by petition on the part of the Duke of Roxburghe, upon considering which, with answers, their Lordships, on the 14th December 1815, adhered.

My Lords,—This decision settled the question as to the effect of the transaction between Duke John and the persons who had held the wadset right in the year 1764; and the effect of this determination was, that the result of what took place in the year 1764 was this, that the wadset right was discharged, and that that wadset right was consolidated with the superiority, and therefore was subject to the original entail; and consequently that Duke James was entitled, as heir of entail, to those lands, and Mr Wauchope, as trustee under the disposition executed by Duke John, had no right to retain the possession of those lands.

My Lords,—Then a question arose with regard to the bygone rents. The Duke contended, that it being decided that he was entitled, as heir of entail, to the lands, he was entitled to the bygone rents. Mr Wauchope, on the other hand, contended, that he bona fide holding these lands until the first decision of the Lord Ordinary of the 24th February 1815, the Duke, according to the law of Scotland, was not entitled to recover from him the rents he had received. My Lords, these questions came to be discussed before the Lord Ordinary on the 6th March 1816, and he then pronounced this interlo-

March 9. 1825. cutor :—(His Lordship then read it. See p. 45.) The condescendence ordered by this interlocutor having been accordingly lodged and followed by other procedure, it appears that the Lord Ordinary, having made *avizandum*, pronounced the following interlocutor on the 27th November 1817 :—(His Lordship then quoted it. See p. 45.) I should have stated, that Mr Wauchope contended that he was entitled to retain part of the sum uplifted by him on account of the money paid by Duke John for the wadset ; and that point has been partly discussed at your Lordships' Bar.

My Lords,—This interlocutor having been submitted to review, the Lord Ordinary was pleased to pronounce, on the 12th of May 1818, the following interlocutor :—(Quotes it). These judgments were brought under the review of the Court by the Duke of Roxburghe ; and on the 27th of November 1818, the First Division of the Court of Session, having ordained Mr Wauchope to lodge in process a state of his accounts, shewing the funds received, and the application and disposal of the same, thereafter, on the 23d May 1822, pronounced this interlocutor :—(Quotes it). The result, therefore, of these interlocutors of the Lord Ordinary and the Court of Session is this, that, in their judgment, Mr Wauchope had been the *bona fide* possessor of these lands until the first interlocutor of the Lord Ordinary was pronounced, so far as respects the lands of Grange ; and that therefore the Duke of Roxburghe had no right to recover from him these bygone rents, except from the period of that interlocutor.

My Lords,—His Grace has appealed from those interlocutors which decided against his right to bygone rents ; and the respondents, in consequence of that appeal, have, in respect of the interlocutors pronounced in the action of reduction, entered a cross appeal against the judgment of the Court of Session, by which it has been decided that the lands of Wester-Grange had been, by the transactions of the year 1764, consolidated with the superiority, and therefore had been incorporated in the original entail. The two questions have been very ably argued at your Lordships' Bar. The first question I have stated to your Lordships is upon the effect of the discharge of the wadset in the year 1764. My Lords, it appeared to be admitted in the argument, that an heir of entail, whose estates were subject to a wadset right of this description, might, if he chose to discharge that wadset, keep alive that wadset right as distinct from the entailed lands. On the other hand, that it was competent for him to discharge that wadset right so as to consolidate it with the entailed estate ; and it was said that, therefore, that reduced it in every case to a question of intention on the part of the party who discharged the wadset, whether it was his purpose to keep alive the wadset right as distinct from the entail or not ? And it was argued on the part of the appellant in the cross appeal, that in this case you have evidence of the intention of John Duke of Roxburghe not to discharge this wadset right, in consequence of a case which had been stated in his behalf shortly before that tran-

saction, and in consequence of an answer which had been given by certain persons at that time very learned in the law of Scotland. March 9. 1825.

My Lords,—In looking through that case, it did not appear to me that the Duke of Roxburghe, or his agents, indicated any such intention; but that, on the contrary, it rather appeared that it was his wish to get rid of the wadset right, but with a view to reannex it to his entailed estate,—the lands of Wester-Grange having been originally comprised in the entail.

My Lords,—In answer to one of the questions which were stated to the learned Counsel on this occasion, those learned persons perceiving; as I apprehend, that it was the intention of the Duke to reannex this wadset right, and to consolidate it with the entailed estate, gave it as their opinion, that 'though the Duke, as heir of entail, may not be liable to the debts and deeds of Earl William, granted by the wadset 1662, and takes the reversion as heir of entail, he must take it cum suo onere, whereof this is one, that the wadsetter be relieved of the minister's stipend. But it is proper that his Grace should know; that when he shall have redeemed this wadset, and taken a reconveyance or renunciation of the same, in favour of himself and his heirs of tailzie, they will not be subjected to the fetters of the entail, or inalienably consolidated therewith, unless a new deed of entail of these is executed.' Now, my Lords, a very important remark was made on this case by the Counsel for the Duke, that that case did not state—and I believe he was accurate according to my perusal of it—that the lands of Wester-Grange had been originally comprised in the entail, but that, for whatever appeared in that case, the wadset right had been granted anterior to that entail. But, however, my Lord Duke having discharged the wadset, took from the trustee for the wadsetter what is called a renunciation, containing also a procuratory of resignation. My Lords, that deed is executed on the 22d day of May 1764; and it appears that, by virtue of the procuratory of resignation, the resignation was duly made on the 11th June 1764.

My Lords,—It appears to me that this question must be decided upon the force and effect of these instruments, because, as I have already said, I do not see any distinct evidence in this case, either on the one side or the other, unless you have recourse to the disposition of 1803, which was long subsequent to the transaction, whereas I apprehend the intention of the party must be shewn at the time when his resignation took effect. Then if you are to decide this question, as I apprehend you must, on the effect of the written instruments, several objections have been made, on the part of Mr Wauchope, to the effect of the renunciation and this resignation. It is said, in the first place, that this renunciation alone was not sufficient to divest the predecessor of his wadset right in those lands the feudal right of which he was invested with, and that it was absolutely necessary it should have been accompanied with this procuratory of resignation, and a resignation made in consequence of that.

March 2. 1822.

My Lords,—In answer to that it was argued on the part of the Duke, that, according to Mr Erskine's Institutes, a book certainly of very considerable authority, a renunciation alone was sufficient. I should, however, state to your Lordships, that my Lord Stair certainly does not confirm Mr Erskine upon that subject, because my Lord Stair, when speaking of the destitution of wadsets, says, (page 344. B. 2. tit. 10. § 19.) 'It remaineth now to consider the destitution of wadsets, and how they cease; and this is either by consent or law: by consent, either when the reversion is discharged, whereby the infestment becomes irredeemable and ceaseth to be a wadset, which discharge of the reversion is not effectual against singular successors, unless registrars conform to the said Act of Parliament 1607, c. 16.; or otherwise by voluntary renunciation of the wadset, which must be registered by the said Act, or else it prejudgeth no singular successor in the wadset; yet it is not effectual to denude the wadsetter who remains in the fee of the wadset till the reverser get a resignation ad remanentiam, if the wadset be holden of the granter himself, or be reserved by the superior, if the wadset was public; and a renunciation, without a new infestment, is not sufficient.'

My Lords,—Mr Erskine, (2. 6. 17. and 18.) who wrote in more modern times, states, 'In the redemption of wadsets which have not been made real, a simple discharge or renunciation by the wadsetter, though not registered, is a proper extinction of the right, because as long as a right remains personal, it may be effectually renounced by a personal deed. But where sasine has proceeded on the wadset, it must be distinguished whether the right be holden base of the reverser who grants it, or of the reverser's superior. When the wadset is holden of the reverser, it is usual to insert in the wadsetter's renunciation a procuratory resigning the lands to the superior, granter of the wadset ad remanentiam, and, after the surrender is made, to register the instrument of resignation, together with the renunciation, in the Register of Sasines; which, without any new infestment, extinguishes the wadset, and consolidates the property, with the superiority, in the reverser. But a simple renunciation, properly registered, has the same effect without resignation.' It was contended, therefore, that, according to this statement, a renunciation would have been sufficient without its being accompanied with a procuratory of resignation, and a resignation made in consequence. It does not appear to me, however, that it is necessary for your Lordships to decide that question, because here this renunciation has undoubtedly been accompanied by that which my Lord Stair said it should be accompanied by; and which, it is agreed by Mr Erskine, is generally the accompaniment of a renunciation in modern times. There is a procuratory of resignation by the then wadsetter, the person in the succession of the wadset, and by his trustee. But it was said that that was incorrect; that the disposition made by Davidson, who was the representative of the wadsetter, to Cockburn, created a

March 9. 1826.

new right in Cockburn, a base fee as it is called, a right holden of Davidson; and therefore the proper course would have been for Cockburn to have resigned the whole to the Duke, and that this joint procuratory of resignation was therefore incorrect. I observe that the Lord Ordinary has proceeded upon the ground that Mr Cockburn was a trustee for Davidson; and it seems to be admitted in the argument, that if that was established there was no objection to this procuratory of resignation. But it was said he was no trustee. On handing up, however, the instrument, it appears clear that he was trustee. It is true he was trustee for creditors; but he was trustee also for Davidson. If there was any surplus of the estate, he was to be trustee for Davidson quoad that surplus. This appears to be a very nice question in the law of Scotland to raise in a case of this sort; but I must confess, that on the best consideration I have been able to give to this judgment, it appears to me that the conclusion at which the Lord Ordinary arrived is the correct conclusion; that in this case there is a sufficient procuratory of resignation of these parties, Mr Davidson and Mr Cockburn, to the Duke; and that this procuratory of resignation having been afterwards executed, the wadset right was thereby extinguished and consolidated with the superiority in the Duke of Roxburghe; and that having been previously entailed by the author of the entail in 1642, the Court of Session have adjudged rightly in saying that wadset lands come again under the fetters of the entail, and that consequently James Duke of Roxburghe was entitled in this action of reduction to succeed in reducing this trust-disposition, inasmuch as John Duke of Roxburghe, not having taken it to himself to keep it alive, had no right to dispose of it by that trust-disposition in 1803, and consequently that James Duke of Roxburghe was entitled to succeed to it as heir of entail. It appears to me, therefore, that there is no ground to disturb that decision of the Court of Session.

The next question is one of great importance, and which an English lawyer must always approach with great distrust; for we have no such law in this part of his Majesty's dominions. With us, if a man possesses a right to an estate, it follows of course that he is entitled to the produce, with the exceptions introduced for the purpose of quieting possession. The law of Scotland, however, is quite different in that respect; and it is of the utmost importance to the administration of law in that country, that when your Lordships are called upon to decide a question coming from those Courts, you should take care to be most cautious that no prejudices arising from education in English law, that no prejudice arising from English decisions, shall at all affect your judgment in deciding upon that point, but that it shall be decided according to the law of Scotland; by virtue of which law the parties hold their estates, and into which law you would introduce the greatest confusion, if you attempted, even by analogy, to carry that which is the law of England; and since I have had the honour of rendering my humble and feeble assistance to your Lordships, as well as before,

March 9. 1825.

when I was intrusted with the conduct of cases for argument at your Lordships' Bar, it has been my anxious desire, (and I trust I have succeeded), to bring my mind as fully as possible to judge in a Scotch case on the principles of Scotch law and on the decisions in Scotch law, abstracted from English decisions and from English law.

Now, my Lords, for the law of Scotland in this respect, I cannot do better, perhaps, than refer to that authority to which I have already referred, Mr Erskine, who states the more modern law upon the subject, and more at large than Lord Stair, though Lord Stair is of the highest authority in the law of Scotland. I shall call your Lordships' attention to what Mr Erskine states upon the subject (2. 1. 25.) when explaining the different effects of holding an estate *bona fide* and *mala fide*. (His Lordship then read the passage beginning, 'A *mala fide* possessor is one,' &c.) My Lords, the first question, therefore, which the Court had to determine was, whether there was a *bona fide* possession within the meaning of the Scotch law? and it was said there was; that Duke John had taken upon himself, as the owner of this property, to dispose of this; that he was not disturbed in that possession by the first Duke, who, at all events, lived a twelvemonth after Duke John; that he remained quietly in possession till the year 1815, when this suit was instituted. Then, after the death of Duke William, it is said, there arose a competition between those persons conceiving themselves entitled to the estates and the title of Duke of Roxburghe, and that therefore it could not be said that this person held with the consent of those persons entitled; that the right was not ascertained, but there was a person appointed to watch over the estates. It is sufficient, however, to say, that, from the year 1804 to the year 1815, the trustee possessed under a *prima facie* title under that deed of disposition. True it is, that deed of disposition has since turned out to be bad. It has since been determined, that the Duke had no right to dispose of the interest by that disposition; but as that was a question of difficulty, and as it must be admitted on all hands of some nicety, it is too much to say that the trustee was not a *bona fide* possessor of the property, having reason to think himself, (in the language of Mr Erskine), entitled to hold it under that trust-disposition. It appears to me, therefore, that the Court of Session have adjudged rightly in that respect.

But the main argument at your Lordships' Bar has been of this description,—that though a *bona fide* possessor, yet possessing *qua* trustee, and, as it was argued, the funds not being disposed of by him in pursuance of that trust, but remaining in his hand as an accumulated fund for the benefit of those who were entitled to the trust, that though those were rents and profits *percepti*, they were not *consumpti*, but in *medio* in the hands of the trustee; and that therefore the estate, being now found to be the property of the Duke of Roxburghe, he was entitled to them as funds in *medio*.

March 9. 1825.

Now, my Lords, let us for a moment consider the situation of the parties with respect to this question. The trustee, when he received these rents, (for received them he has), received them by virtue of that trust-disposition; and, I apprehend, when they got into his hands, they were in his hands for the benefit of the persons entitled under the trust. It is true that the Ladies Ker disputed the validity of that trust-deed, as far as affected their rights, and refused to come in under it; they being liferenters of the surplus of it, if they chose to accept it, and, at their deaths, the surplus being to be distributed among certain persons. But it appears to me, in the first place, that that was not a question which the Duke of Roxburghe could take any advantage of. The trustee had received the rents qua trustee, for the benefit of those who might be entitled under the trust. It was indifferent to the Duke of Roxburghe, and a question with which he had nothing to do, whether the persons, for whom the trustee was a trustee, were quarrelling in respect of the extent of their interest in this fund. If the fund was bona fide received by the trustee, as the Court of Session have found it was, it might have been in medio as between the persons entitled under the trust. But these persons entitled under the trust have a right to say, either I, A, or I, B, am entitled, as against the trustee, though we have not yet applied. It, however, appears to me, that your Lordships are not let in to that question; for I perceive, when the point fairly came before the Court of Session, they directed a state to be handed in by the trustee; and when your Lordships look at that state then handed in, you will find, that those rents of Wester-Grange, together with a great deal of other property, were brought to account; and, my Lords, in the accounts of payments to the Ladies Ker, which were pointed out to me in the course of the argument, occurs this passage:—'Payments to Ladies Ker on interim warrants of the Court of Session, whereby consideration was reserved, whether the same were to be applied to the account of the general liferent of the funds provided to them by the Duke's settlement, or towards the bond debt due to them; per first report, L.5000, per second do. L.12,000,' making therefore L.17,000.

The argument is:—But the Ladies Ker have been found not entitled to the liferent of the fund, and the distribution that was made is to be taken to have been in consideration of the liferent, or in payment of the debts of the Duke. The rents of these lands of Wester-Grange have been mixed up with the other property, and have been applied by this trustee, as far as he could, in discharge of that trust. From the time it was ascertained that the Ladies Ker were not entitled to their liferent, they have not received payments on account of the liferent, but payments have been paid to them and others on account of the debts. And in the second account, which is carried up, I think, to 1815, your Lordships will find, that the trustee charges himself with all the rents of the unentailed estates, including the rents of Wester-Grange, and he charges himself with a variety of sums received on

March 9. 1822. various other accounts. Then he discharges himself to the full amount to which he had charged himself, by various payments he had made to different persons, and by the investment of certain sums arising from the produce of the Library, and arising from the produce of a house in St James's-square, so completely balancing the account of those receipts and payments at that time.

It appears to me, therefore, that the Lord Ordinary was well justified in finding, not only that Mr Wauchope had received rents bona fide, but had applied them in discharge of his trust; and, in my opinion, it makes no difference that, in consequence of the determination which has taken place in the case of the Ladies Ker, the surplus may be increased. The question is, whether, during the period those rents were received, namely, from 1804 to 1815, they were received and were applied bona fide; and it is no question whether, in consequence of the disputes which have arisen, some of the parties entitled under the trust may have derived a greater benefit than they expected; but the only question is that which the Court of Session have decided, whether the trustee, during that period, recovered those rents bona fide, and applied them bona fide in execution of the trust. It appears to me, attending to the arguments which your Lordships have heard, and to all which is contained in these papers, that he has done so. I forgot, before I came to this part of the case, to state to your Lordships that which Mr Erskine lays down, and which is proved to be correct in all cases, that actual perception of the rents is not necessary; for he holds, that if a party is bona fide in possession, he is entitled to the rents which have become due during that time, even although he may not have received the rents till after that period. I merely mention that, to shew that it would be in vain now to go back to the origin of this rule, which probably was that stated by Mr Erskine, that parties in the bona fide possession of property have not only received the profits, but consumed them in their mode of living, and that it would be extremely hard that those profits should be withdrawn from them. The question of consumption cannot, therefore, come into the consideration of the Court. But, generally speaking, the question is, whether they had been received bona fide during the time of a bona fide possession; and here, not only have they been so received, but they have been applied by the trustee bona fide, in execution of the trust devolved upon Mr Wauchope by the trust-instrument.

My Lords,—Although it is not always usual, in cases where it is the intention to move to affirm the judgment, for the individual moving that to state all the reasons which induce him to ask your Lordships for the affirmance of the judgment, yet, in a case of so much importance as the present, I have thought it my duty to state to your Lordships the grounds on which I have arrived at the conclusion that the Court of Session have decided rightly in both respects, rather than leaving the parties in the dark as to the reasons which may have

induced the humble individual addressing your Lordships to make that motion. After the most anxious consideration, I have been unable to reach any other conclusion than that, in conformity to the law of Scotland, this was a redemption consolidating the wadset with the superiority, that superiority having been originally entailed by Earl Robert in 1648, and is brought within the fetters of the entail; and that, on the second question, the Court of Session are also right in determining that, until the first interlocutor of the Lord Ordinary, there was a bona fide possession, that might be carried, and has been carried by your Lordships down to a later period; for, in a case last Session, it was carried down to the decision of the House of Lords. It appears to me that there has been a bona fide possession; that the trustee has received these rents bona fide according to the laws of Scotland, according to which law this question must be decided; and that he has, as far as he could, applied these rents to the discharge of the trust imposed upon him; and that the Court of Session have therefore adjudged rightly in saying, that these bygone rents cannot be recovered by the Duke of Roxburghe, until the period of the first interlocutor of the Lord Ordinary. Having stated to your Lordships my view of the case, I have only further to move your Lordships that the judgment be affirmed.

March 9. 1825.

Duke of Roxburghe's Authorities.—(WADSET).—2. Ersk. Inst. 8. 16.; Grant v. Donaldson, March 11. 1786, (8689.); Campbell v. Spiers, Dec. 14. 1790, (8652); Campbell v. Common Agent of Edderline, Jan. 14. 1801, (App. Adjudication).—(RENTS).—2. Ersk. Inst. 1. 25.; Ogilvie v. Ogilvie, (Note to Roxburghe v. Wauchope, June 13. 1822); Stair's Inst. 1. 28.

Wauchope and Others' Authorities.—(WADSET).—Earl of Peterborough v. Creditors of Fraser, Feb. 4. 1738, (3086.); Kerr v. Turnbull, Feb. 15. 1758, (1555.); 2. Ersk. Inst. 8. 18.; Hope's Minor Practics, 170.; Ross's Lectures, vol. ii. p. 369.; Bell's System of Deeds, vol. ii. p. 74. et seq.; M'Lellan, Jan. 7. 1780; Graham v. Galbraith, Jan. 14. 1814, (F. C.).—(RENTS).—2. Ersk. 1. 25.; Beany v. Morris, July 30. 1760 (1287.).

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

PETER M'ARTHUR, Appellant.—*Sol-Gen. Hope—Fullerton.* No. 8.

ANDREW JAMESON and Others, Trust-Disponees of LYDIA TURTON OF FALCONER, deceased, Respondents.—*Adam—Abercrombie.*

Implied Revocation—Clause.—A husband having purchased landed estates at a judicial sale, and executed a deed of conveyance and settlement, proceeding on the narrative, that 'I am now resolved, in the event of my death, before my titles to the said lands and estate are made up and completed, to convey the said purchase to and in favour

‘of my dearly beloved wife,’ and assigning and conveying such and such lands to his wife, ‘her heirs, assignees, and disponees;’ and having thereafter taken from the Crown a charter of sale and resignation of these lands to ‘him, his heirs and assignees;’—Held, (affirming the judgment of the Court of Session), in a question between the wife and the heir of her husband, that the conveyance to his wife was not revoked by the Crown-charter.

March 22. 1825.

Lords Gillies and
Meadowbank.

JOHN FALCONER purchased at a judicial sale the estate of Durn, comprehending, first, The barony of Durn, holding of the Crown; secondly, The lands of Westside and others, formerly part of that barony, now holding of Keith Dunbar; and, thirdly, The lands of Dykehead and others, holding of the Duke of Gordon. These lands, from being contiguous, were known by the general name of the estate of Durn; but the decret of sale expressly sold, disposed, and assigned, decerned, and declared, ‘all and hail the foresaid lands of Durn, comprehending the mains of Westside, Rosswell, the twenty boll tack, &c. lying within the parish of Fordyce, and shire of Banff; as also sold and disposed, adjudged, decerned, and declared, all and hail the foresaid lands of Meikle and Little Dykehead, the town and lands of Redstocks, &c. lying within the lordship of the forest of the Boyne parish foresaid of Fordyce and shire of Banff.’

Shortly after making this purchase, Falconer executed a deed of settlement in these terms:—‘Know all men by these presents, that I, John Falconer of Catney, in the county of Surrey, proprietor of the lands and others after-mentioned, considering that at a judicial roup and sale of the lands and estate of Durn, upon 4th August last, proceeding in a process of ranking and sale at the instance of Sir Robert Abercrombie of Birkenbog against Mr James Dunbar of Durn, John Robertson, writer in Edinburgh, offered for me the sum of L.16,500 sterling for the said lands, and being the only offerer was preferred thereto, &c.; and that I am now resolved, in case of my death before my titles to the said lands and estate are made up and completed, to convey the said purchase to and in favour of Lydia Turton, alias Falconer, my dearly beloved wife, to whom I have, by a former settlement, conveyed my whole personal estate, out of which the price of the said lands and estate must be paid: Therefore, and for the love, favour, and affection which I have and bear to her, wit ye me to have assigned, conveyed, and made over, likeas I hereby assign, convey, and make over, to and in favour of the said Lydia Turton alias Falconer, my wife; her heirs, assignees, and disponees, all and whole the said lands and estate of Durn, lying in the parish of Fordyce and shire of

‘ Banff, as the same are more fully described in the articles of March 22. 1825,
 ‘ roup, on which the said sale and roup proceeded; together with
 ‘ the said articles of roup themselves, minutes of roup, and en-
 ‘ actments following thereon in my favours; together with the
 ‘ interlocutor in the sale to be pronounced thereon in my favour.
 ‘ by the said Lords; with all that has followed or may be compe-
 ‘ tent to follow thereon; surrogating and substituting her and
 ‘ her foressaids in my full right and place of the premises, with
 ‘ full power to her and to her foressaids, in case of my death be-
 ‘ fore I shall have made up my titles to the said lands and estate,
 ‘ and made a settlement thereof, to obtain the said decreet of sale,
 ‘ and make up her titles thereto, in virtue of these presents, in the
 ‘ same manner that I could have done myself if in life; declaring
 ‘ always, that the said Lydia Turton alias Falconer, shall be bound
 ‘ and obliged, as she, by acceptation hereof, and of the former
 ‘ settlement made by me in her favour, binds and obliges her, her
 ‘ heirs, executors, and successors, to make payment of the price
 ‘ of the said lands, and to get up and deliver to the said John
 ‘ Robertson the bond above-mentioned, granted by him and me;
 ‘ therefore, and reserving always full power and liberty to me at
 ‘ any time in my life to alter and revoke these presents by any
 ‘ writing under my hand, and declaring that, in so far as these
 ‘ presents shall not be revoked or altered by me in manner fore-
 ‘ said, the same shall have the full force and effect of a delivered
 ‘ evident, though found in my custody, or in the custody of any
 ‘ other person, undelivered at the time of my death, whereanent
 ‘ I hereby for ever dispense, consenting to the registration,’ &c.

Mr Falconer completed his titles to that part of the lands held of the Crown, by taking a charter of sale and resignation to himself, his heirs and assignees; and was in course of making up titles to the rest of the property, held of subject superior, when, in 1788, he was killed by a fall from his horse.

Mrs Falconer then entered into possession under the settlement of 19th September 1786, led an adjudication in implement against Margaret Falconer, considered to be the heir-at-law of the deceased, and took from her a disposition of the lands in implement of the obligation in the settlement, and completed a title to the whole estate, whether holding of the Crown or of subjects superior. Subsequently to the date of the settlement in favour of his wife, Falconer had acquired right to the superiority which had remained in the person of Keith Dunbar, and this, along with the other subjects, was included, though ineptly, in the titles Mrs Falconer thus made up.

March 22. 1803.

She enjoyed the estate under these titles until 1804, when John Falconer, the true heir of line of the deceased, commenced an action of reduction of the titles she had made up, on the grounds that Margaret Falconer was not the heir of line, and therefore any titles flowing from her were null; that Mrs Falconer's right was radically bad, inasmuch as her claim rested on the conveyance and settlement by Mr Falconer, which included only the lands and barony of Durn proper, and which, even as it regarded those lands, was vacated by the titles subsequently made up by him in favour of himself, his heirs and assignees; and that the right of superiority from Keith Dunbar having been acquired subsequent to the date of the settlement, could not be carried by the settlement. Besides the reductive conclusion, the summons concluded to have it declared and decreed, 'that the assignation and conveyance by the said deceased John Falconer in favour of the defender Mrs Lydia Turton, was granted under the condition and in the event of his dying before obtaining the decreet of sale, and making up titles to the lands and barony of Durn, and limited to that period solely; but by the survivance of the said John Falconer for ten months after making up his titles, his taking the decree of sale to himself, his heirs and assignees, the said conveyance was not only virtually revoked, but the condition under which it was granted was never purified by the decease of the said John Falconer before his titles were completed;—' That the barony of Durn is alone comprehended in the said conveyance, and that the other subjects, viz. the lands of Westside, &c. holding feu of the deceased Keith Dunbar, depute-clerk of Session; also the lands of Meikle and Little Dykeshead, &c. holding of the Duke of Gordon; and also the Moss-tolerance, obtained from and held feu of the family of Park—are separate and distinct tenements, unconnected with or disunited from the barony of Durn and others, described in the conveyance by the deceased John Falconer in favour of the defender Mrs Lydia Turton, and therefore not disposed as a part or an appendage of the barony of Durn thereby; but that the said whole lands, and others foresaid, belong in property to the pursuer, as the undoubted heir and representative of the deceased John Falconer of Durn.'

In the course of the litigation the pursuer and defender died, and the action was insisted in by their disponees. The Lord Ordinary sustained 'the reasons of reduction of the several

'title-deeds libelled, expedite by the deceased Mrs Lydia Turton or Falconer, and her disponee, for the purpose of vesting them in the right of the lands and other subjects in question, in so far as the titles flow from Margaret Falconer, sometime at Tarrieff, or proceed upon adjudications in implement, deduced and followed out by the said Lydia Turton or Falconer against the said Margaret Falconer, and reduced, decerned, and declared accordingly; and particularly, in so far as these titles contain or relate to the superiority of the lands of Westside, Hogswell, Broomhillock, and others, formerly vested in the person of Mr Keith Dunbar, and acquired by the late John Falconer of Darn from him, decerned and declared in terms of the declaratory conclusions of the libel to that extent accordingly; but, quoad ultra, repelled the reasons of reduction, sustained the defences, assoilzied the defenders from the reductive and declaratory conclusions of the libel, and decerned.' To this judgment the Court, on advising a petition with answers, on the 19th November 1822, adhered.*

The Judges were of opinion, that it was the manifest intention of Falconer to convey to his wife all he had acquired under the decree of sale; that, accordingly, he had assigned to her that decree, and that the subsequent charter was not intended to defeat her right.

M'Arthur (Colin Falconer's disponee) appealed.

Appellant.—The deed of conveyance and settlement of 10th September 1796 carried the 'lands and estate of Darn,' but not the other lands contained in the decree of sale. It is quite irrelevant in a question of the present nature to go into the intention of parties. The terms of the dispositive clause must be the *regula regulans*. There was no pre-existing onerous contract to which reference can be made as inferring an obligation to make an additional conveyance. The settlement was entirely gratuitous, and the obligation imposed on Mr Falconer's heirs must be therefore measured by the precise terms of the conveyance. The preamble cannot be let in to affect the discussion. Besides, the conveyance was virtually revoked. While holding the personal right to the lands, Mr Falconer conveyed them (so far as the settlement did convey them) to his wife; but thereafter he made up titles to them, and conveyed them to himself, his heirs and assignees; thus altering the conveyance to his

* See 2. Shaw and Dunlop, No. 23.

March 22. 1824. wife into a conveyance to his heirs-at-law. The expression 'heirs and assignees' denotes 'heirs general;' and although the original design of adding the word 'assignees' might have been to reserve a party's right to exclude heirs-general, that object would be accomplished by a deed of date posterior to the titles made up: using that term would not keep alive the right of a party called by a prior deed; for it is a settled law, that an investiture to heirs and assignees completely effaces every prior personal destination. There is no authority for the distinction taken by the respondent, that the charter to Mr Falconer cannot be considered a revocation of his conveyance, because under that conveyance he had no right; it only binding him and his heirs, and merely to take effect at his death. Whether a mortis causa deed, or not, the destination was changed. The charter completed his investiture, and extinguished the previous settlement. Even as it is, the settlement was to be limited in its effect to the contingency of Mr Falconer's right remaining personal at his death, a contingency which did not happen.

Respondents.—The conveyance and settlement of 19th February 1786 was intended to convey, and did convey, the whole lands purchased by Mr Falconer at the judicial sale. In using the words 'lands and estate of Durn,' he comprehended the whole lands, 'as the same are more fully comprehended in the 'articles of roup;' and by that appellation they are known. Land certainly cannot be conveyed without dispositive words, whatever may be the intention; but here the deed sufficiently designates and disposes what the disponent meant to convey. This is not a competition between the respondents, founding on an obligation to convey, and a third party having acquired complete right by onerous titles. It is a question of obligation; and if the appellant claims as heir, he must implement the obligation imposed by the deceased on himself. The point of onerosity does not enter into the discussion; although gratuitous, the obligation fastens on the heir.—But in truth the obligation was not gratuitous. It came in place of the previous settlement of moveables, part of which were taken to make the purchase. This conveyance was never revoked, directly nor indirectly. The charter Mr Falconer took was in conformity to the terms of the decret of sale; and by the term 'assignee,' he calls his wife, whom he had by previous settlement vested with that character. A party merely renewing his own titles, does not revoke or alter any previous destination he himself may have made of the estate, and which is not to take effect until his death. He

cannot be said to have a right to the estate under the conveyance. It was merely the written indication of its transference at his death. There was no change of investiture. He merely made his personal right real, retaining the same destination in favour of himself, heirs and assignees. In fact and law, the conveyance neither was nor could be part of the investiture. It was a mortis causa disposition, not to take effect until death; and its operation commences on that event arriving, and no sooner. The plea, that the conveyance was conditional, proceeds on a misapprehension of the intention, as well as words, of the deed.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.'

Appellant's Authorities.—Clark, May 31. 1821, (1. Shaw & Ballantine, No. 52); Mollo, December 13. 1811, (F. C.)

J. RICHARDSON—A. MUNDELL,—Solicitors.

GEORGE PENTLAND, Appellant.—*Sol.-Gen. Hope—Fullerton.*

No. 9.

WALTER STIRLING GLASS, Respondent.—*Bosanquet—Keay.*

Bankrupt—Prisoner.—Circumstances under which (affirming the judgment of the Court of Session) the benefit of the cessio bonorum was granted to a party, on condition of introducing into the disposition omnium bonorum a clause revoking all deeds granted by him 'which may have had the effect of excluding his jus mariti over his wife's estate and effects, heritable and moveable.'

GLASS raised a process of cessio bonorum, and was opposed by Pentland, on the grounds, that he had become embarrassed from indulging in extravagant expenditure, totally unsuitable to his means; that, to acquire loans, he had fraudulently misrepresented the state of his funds; that, with a view to disappoint his creditors, he had contrived that property devolving to him from his father should be placed altogether beyond their reach; that, with the same view, property to which his wife had succeeded, after incurring the debts on which he was incarcerated, was vested in his wife, to the exclusion of the husband's jus mariti; that there had not been a fair and complete disclosure of his means and estate, so as to make the disposition omnium bonorum

March 23. 1825.

1st DIVISION.

March 23. 1825. available; that he was in possession of a handsome house and income, and was, at all events, bound to make over to his creditors whatever remained over an allowance for proper support. Glass answered,—That the allowance at one time given him from his father had been suddenly cut off; that the placing the property devolving on him from his father beyond the reach of creditors, was the act and deed of his father, who had a right to do as he saw proper; that in the same way the *jus mariti* had been excluded, without his being in any way a party to the arrangement; that his house had been fairly bought by Mrs Glass from her own funds; that he had made an ample disclosure of his affairs, and was ready to execute a disposition *omnium bonorum*, so drawn as to enable the creditors to reach all deeds, if such there were, granted by himself, and affecting their interests; that if to a certain degree he had been imprudent, the circumstances in which, from his father's bounty, he had originally stood, would afford an excuse; and that his debt to Pentland, the only opposing creditor, was created by enormous charges for work done as a coach-maker, and accumulation of usurious interest.

The Court of Session, on the 19th of February 1822, found, that he was not entitled to the benefit of the process in *hoc statu*, and twice adhered on advising reclaiming petitions for Glass. Thereafter, on advising another petition, they appointed him to give in an articulate condescendence of all facts and circumstances explanatory of the grounds of his action, and particularly with regard to the alleged transactions relative to the exclusion of the *jus mariti*; on advising which, with answers, replies, and duplies, they altered the interlocutor reclaimed against; found 'that the pursuer's bankruptcy was occasioned by misfortunes, and that he is therefore entitled to the benefit of the process of *cessio bonorum*; and ordain the pursuer to give in a disposition of his whole effects for behoof of his creditors in the usual form, and containing a full and ample revocation of all deeds, granted by the pursuer, which may have had the effect of excluding his *jus mariti* over his wife's estate and effects, heritable and moveable;' and on the 6th February 1823, on his taking the oath, decerned in terms of the libel.

Pentland appealed,—repeated his statement and arguments, —maintained that there had been no usurious dealings on his part, and that such a charge in the present action was calumnious and incompetent.

Glass founded on the allegations and facts in the Court below,

and contended, that imprisonment could not be permitted to be perpetual; and that any imprudence on his part had been severely enough punished by an incarceration of above sixteen months. March 23. 1825.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.'

LORD GIFFORD.—The question here is, whether the respondent be entitled to the privilege of the *cessio bonorum* which he has received from the Court below? He made two or three attempts formerly to obtain this privilege, in which he was unsuccessful; but now he has got it, after more than a year's imprisonment. He maintains, that he is entitled to the judgment of the Court, he having made a full disclosure and surrender. The appellant objects; and the point now is, do your Lordships see any room for finding fault with the judgment? The first ground taken by the appellant is, that the respondent had, through mere extravagancy, contracted the debts. It is, however, admitted, that this is not a ground for perpetual imprisonment. The appellant has been imprisoned for more than a twelvemonth. Now, is there any thing so culpable as to require an imprisonment of a prolonged duration? I see no reason for thinking so. The second objection is more serious, viz. fraud—the attempting to defraud his creditors by deeds purporting to proceed from his father and other persons. I need only advert to them thus generally, as I mean to propose to your Lordships to affirm the judgments complained of; and therefore I shall not trouble your Lordships with detail. On the whole, I may say, that I do not see a satisfactory case that there was fraudulent conduct in this matter. If there be room for challenging those deeds, the appellant can, under the decree of the Court, proceed to do so. But there remains this point, whether the respondent has not been so harassed by the appeal that he ought to be remunerated for his expenses? and humbly conceiving that he ought, I shall therefore propose to your Lordships to affirm, with L. 100 costs.

Appellant's Authorities.—Thom, Feb. 11. 1809, (F. C.); Smith, Feb. 6. 1813, (F. C.); Bell's Com. 'Imprisonment for Debt.'

Respondent's Authorities.—Bell's Com. 'Imprisonment for Debt;' M'Dowall, March 5. 1794, (11,791.); Douglas, Jan. 15. 1794, (11,795.); Law, Dec. 12. 1795, (11,798.); M'Leas, March 1802, (not rep. House of Lords, Aug. 1803); Thom, Feb. 11. 1809, (F. C.); Murray, July 11. 1811, (F. C.); Smith, Feb. 6. 1813, (F. C.); Dalgliesh, July 4. 1801, (not rep.); Boyes, Winter Session, (not rep.); 1. Ersk. Inst. 6. 10.

J. RICHARDSON—C. ARNOT,—Solicitors.

No. 10. Sir MICHAEL SHAW STEWART, Bart. and Others, Commissioners of Major-General Sir THOMAS BRISBANE, K. C. B. and JOHN SCOTT, Ship-builder, Appellants.—*Solicitor-General Hope—Bosanquet.*

JOHN LEAD, Tenant in Chappelton, Respondent.—*Solicitor-General Wetherell—Murray—Keay.*

Tack—Clause.—In a lease of an arable farm, situated near a small town, the landlord having reserved right to feu the whole or any parts or portion thereof, allowing recompense in proportion to the rent payable for the whole; and having feued part of the farm, by a feu-disposition, for a principal sum, with a reddendo of one shilling; and an action of removing having been brought against the tenant; and the Lord Ordinary having decerned in the removing; but the Court having ordered a condescendence as to the practice of feuing lands on the estate, and thereafter assolzieing the tenant;—The House of Lords reversed the judgments of the Court ordering the condescendence and assolzieing the tenant, and affirmed that of the Lord Ordinary decerning in the removing.

March 25. 1825.

2d DIVISION.
Lord Pitmilley.

THE commissioners on the Brisbane estate advertised for sale, by private bargain, five enclosures, containing 33 acres 3 roods and 38 falls, or thereby, being part of the estate of Chappelton, situated upon the rising ground behind the town of Largs, with a commanding view of the sea and islands in the Frith of Clyde, peculiarly favourable for a villa, and capable of being highly ornamented, the ground to be 'sold in either one, two, or four lots.' Scott thereafter feued these lots from the commissioners, paying down L.5500, and an annual duty of 1s. The feu-disposition proceeded on a 'minute of sale' entered into by the parties, and bore that the commissioners 'have sold and in feu-farm disposed, as we do hereby sell, alienate, and in feu-farm and heritage let, demit, and dispone,' &c.

At this time these lands were held in lease by John Lead, whose father had, in 1806, obtained a lease of the farm of Chappelton, of which they formed a part, from General Brisbane's father, for fifteen years, at three guineas per acre, the term of removal being Martinmas as to the arable land, and Whitsunday as to the houses and grass. But the lease contained this reservation, 'Reserving always to the said Thomas Brisbane and his heirs, at any time during the currency of this tack, full power and liberty, not only to quarry limestone and other stones, and to bore and search for coals, and to work the same, or any minerals or metals within any part of the said

March 25. 1825

‘lands, and to plant what parts thereof they may think proper, and to make roads through any part of the same; but also to feu the whole, or any parts or portion thereof—the said Thomas Brisbane, or his foresaids, always allowing recompense for the grounds so worked, planted, or feued, in proportion to the rent payable for the whole.’ Acting on this clause, the commissioners intimated to the tenant to remove at Martinmas 1815 as to the arable land, and Whitsunday thereafter as to the houses and grass. Lead, in return, intimated to the commissioners, that he intended to hold possession of the farm until the expiry of his lease, (1821). Thereupon the commissioners presented a summary petition to the Sheriff of Ayrshire, praying that Lead might be ordained to cede and give up the possession of the five enclosures of the said farm of Chappelton feued to the said John Scott, at the term of Martinmas 1815 as to the arable land, and at Whitsunday following as to the pasture grass; and in the event of failing to remove at these terms, concluding for damages, violent profits, and expenses.

The Sheriff-substitute found, ‘that by the said tack the petitioners’ constituent reserved full power and liberty not only to quarry limestones, &c. but to feu the whole, or any part or portion of the lands thereby set: finds it averred by the petitioners, and not refused by the respondent, that they have lately feued to the other petitioner, Mr Scott, five enclosures of the farm of Chappelton, situated on the east side of the road leading from Largs to Brisbane, and on the south side leading to Barnside, consisting of about 34 acres; therefore finds, agreeable to the covenant of parties, that the respondent must cede and give up said possession as craved by the petitioners: finds, that the respondent must be allowed recompense for the ground so feued in proportion to the rent payable for the whole and improvements made thereon;’ and for that purpose appointed inspectors to report thereon.

The case being taken by advocacy to the Court of Session, the Lord Ordinary ordered production of the feu-right and disposition to the subjects, with infestment following, and quoad ultra sisted procedure until the pursuers brought a process of declarator; which action having been raised and conjoined, his Lordship, on the 28th February 1816, pronounced this judgment:—‘Repels the reasons of advocacy, and remits the cause simpliciter to the Sheriff of Ayrshire; and in the action of declarator and removing, repels the defences, and decerns in terms of the libel, with this declaration, that the defender’s

March 25. 1825. 'claim to a recompense for ceding possession of the lands feued, and all questions concerning the amount or rate of said recompense, and the grounds on which it is to be fixed and ascertained, are reserved, and will be discussed in the process before the Sheriff.' To this judgment he adhered on the 23d May 1817. Lead then petitioned, and the Court, on the 15th January 1818, before answer, appointed the pursuers 'to give in a special condescendence, in terms of the Act of Sederunt, of the facts which they aver and offer to prove as to the practice of granting feus of part of the estate of Brisbane, previous to the date of the lease in question, and since that period;' and on the 3d July 1818 they recalled the Lord Ordinary's interlocutor, and appointed a new condescendence in terms of the former order to be given in. Thereafter, on the 5th February 1820, their Lordships, on advising the condescendence, with answers, and 'the whole circumstances of the case, altered the interlocutor complained of; and in the process of advocacy advocated the cause, sustained the defences, assoilized the defenders, and decerned.' In consequence of an equality of voices as to the question of expenses, the case was superseded till the 11th, when their Lordships found expenses due. To these judgments their Lordships adhered on the 27th February 1821, and on the 24th November they decerned for L. 209. 14s. 7d. of expenses.

The pursuers appealed.

Appellant.—The interlocutors of the Sheriff and of the Lord Ordinary proceeded on a just view of the contract of lease. The power there reserved to feu the whole, or any parts or portions, is unqualified and unlimited, either in regard to the extent of ground to be feued, or to the species of feu-rights to be granted; or their terms and conditions. There is no stipulation that the feus are to be merely building feus, or that the consideration for them is to be entirely an annual sum equivalent to the rent. On the contrary, the landlord was entitled to feu for what purpose he chose, and either to take a large annual payment, or a principal sum and a nominal feu-duty. With these matters the tenant had no concern. It is sufficient that the appellants entered into a feu-contract. The inquiry ordered respecting the practice of granting feus of parts of the estate of Brisbane previous to the date of the lease in question, and since that period, was utterly incompetent. It is contrary to the established rules of law, and a most dangerous precedent, to allow extrinsic evidence, even of the most unsuspicious character, to shake the security of a right fixed by

March 25. 1895.

a regular instrument, or to controul a written contract by a limitation not to be discovered in any part of the deed itself. The tenant could not have been permitted to prove by testimony what the Court has seen proper to let in. Even if the extrinsic evidence had been competent, the mode or extent of dealing with others cannot afford any secure grounds for interfering with the parties in this particular case. Still, such as it is, it is in favour of the appellant. The practice has been general on the estate to feu; and in particular, this mode of disposing of the property was eligible in respect of the proximity of the town of Largs. Tenants holding under leases containing the same clause with that in question, acquiesced in being removed from 1600 acres purchased by Mr Scott, and held by him in feu for a small feu-duty. The respondent has referred to an entail of the estate of Brisbane executed in 1792, and which, he maintains, proves that only small feus were in contemplation of the entailor who granted the Chappelton lease. But it is impossible to allow the tenant to rest on such grounds; and even if he did, the entail having been granted under heavy debts, the restriction to small feus, supposing such a restriction existed, could only relate to the management of the estate after these debts are paid off, which could be effectually done by transactions of the very kind the respondent has challenged, and merely could have relation to the preservation of the pleasure-grounds from encroachment.

Respondent.—The contract in question is a bona fide contract, and must be construed according to the intention of the parties at the time, and the ordinary meaning of the words. It never was contemplated that the lease could be set aside, in whole or in part, by a sale. ‘To feu,’ as the parties used the phrase, meant to give off small portions of land for building. This event a tenant could estimate—as he could a reservation to plant; but a sale does not admit of calculation. There is a particular clause when that is intended, and would of course have been introduced if such an occurrence were in view. The whole conduct of the contracting parties proves, that ‘to feu’ merely related to building grants. In the entail which the lessor had executed some years before, and rescinded in 1801, the feus are limited to that description. Acting on this principle, extensive offices have been erected on the land, and the tenant has expended large sums on its improvement. To be deprived of his whole farm, as the construction of the appellant implies, would not admit of compensation, under much broader words than contained in the compensation clause in the lease. It would be

March 25. 1825. unjust to allow the tenant to be affected by what is in substance a sale, merely because the deed conveying away receives the name of a feu-disposition, and there is an annual though illusory red-dendo. Besides, although a building-feu may, a sale, in whatever form it may be effected, does not necessarily imply a removing of the tenant. The appellants offered to establish that there was such a practice of granting feus on the Brisbane estate as must have prepared the tenant for the event which has happened. In this offer the appellants failed. The practice merely proved to be what was the common practice in other parts of Scotland, and of course must receive a like interpretation as there is given. Besides, the lease is now expired, and the respondent has removed.

The House of Lords ordered and adjudged, 'that the said interlocutors of the Lords of Session in Scotland, of the 15th January and 3d July 1818, the 5th and 11th February 1820, and the 27th February and 24th November 1821, complained of, be reversed. And it is further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 23d May 1817, so far as complained of, be affirmed. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be consistent with this judgment, and as shall be just.'

Appellants' Authorities.—Graham against Rutherford, February 1809, (not reported); Hunter against Craig, 1812, (not reported).

Respondent's Authorities.—Wellwood, 1777, (not reported); Whitton against Duncan, 13th May 1795, (Bell).

J. RICHARDSON—BUTT,—Solicitors,

No. 11.

JOHN WILLIAM HENRY, EARL of STAIR, Appellant.

JOHN EARL of STAIR's Trustees, Respondents.

Trust—Clause.—A party having conveyed to trustees his whole funds, interest and proceeds thereof, to be vested in lands, which were to be annexed to his entailed estate, and bequeathed legacies, of which one was not payable for six months after his death; and his heir of tailzie having claimed the interest of the funds from and after the day on which the truster died;—Held, (affirming the judgment of the Court of Session), That he was not entitled to the interest from that period.

March 29. 1825.

1st DIVISION.
Lord Alloway.

ON the 1st of June 1821, John Earl of Stair died without heirs of his body, having made an entail of his estates in Scotland,

by which he called the appellant as the first heir of entail. He March 29. 1825.
 left a trust-disposition of his whole estates, real and personal, excepting his entailed lands, in favour of the respondents, as trustees, for various purposes; and in particular, after paying his debts and legacies, 'to lay out the residue of the trust-funds, and interest and proceeds thereof, in purchasing lands in the shires of Wigton or Ayr, or stewartry of Kirkcudbright, and at the sight and with the advice and consent of the Lord President of the Court of Session, and of his Majesty's Advocate for Scotland for the time being, to annex the same to my entailed estate, by taking the rights and securities of the lands so to be purchased to the same heirs of tailzie, and under the same conditions, provisions, clauses irritant and resolute, contained in the disposition and tailzie of my lands of Culquhasen and others, executed by me.' He thereafter made a testament bequeathing various legacies, of which one was not to be paid till six months after his death, and declaring that the residue of his effects were to be applied to the purposes of the trust-deed.

In November 1821 the appellant brought an action before the Court of Session against the respondents, in which he set forth, that 'whereas the said John Earl of Stair died upon the 1st day of June last without heirs of his body, and the said pursuer as his heir and executor has right to the whole interest, dividends, and proceeds of the real and personal estate left by the said Earl, from and after the day of his death,' and 'therefore the said Sir John Dalrymple Hamilton Macgill, Bart., Robert Dalrymple Horne Elphinstone, Anthony Goodeve, and John Smith, ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to hold just count and reckoning with the pursuer for the whole interest, dividends, and proceeds of the real and personal estate of the said John Earl of Stair, that has arisen from and since the said 1st day of June last, or that may arise thereon, and to make payment to the pursuer of the balance that may arise upon such accounting; or otherwise to make payment to the pursuer of the sum of £10,000 sterling annually, aye and until the termination of the foresaid trust, and the said defenders are discharged of their actings and proceedings under the same.'

To this action defences were returned on the part of the trustees, that 'it was understood to be Lord Stair's intention, and that intention the defenders conceive is clearly and legally declared, that they should lay out the residue of the trust-funds, and whatever interest should arise from the trust-funds while

March 20. 1825. ' under their management, in the purchase of lands; and they
 ' submit to the Court, that the deed, according to the principles
 ' of the law of Scotland, cannot admit of any other interpretation.
 ' They have already purchased some land, which was conve-
 ' niently situated for the estate; and they intend to make other
 ' purchases without any unnecessary delay, some of which are at
 ' present under consideration.' Thereafter the appellant amend-
 ' ed his summons, by deleting the words ' heir and executor,'
 ' and substituting these,—' is nearest lawful heir of tailzie and pro-
 ' vision served and retoured to the said Earl, conform to retour
 ' of his special service expedé before the Sheriff-deputés of Edin-
 ' burgh, dated 15th September 1821, by which service the pur-
 ' suer has right to the said lands of Culquhasen and others, and
 ' procuratory of resignation contained in the deed of tailzie
 ' thereof, and has thereupon obtained a charter of resignation of
 ' the said lands of Culquhasen from himself as superior of the
 ' same, bearing date the 19th day of November 1821, and as
 ' such has right under the said trust-deed.' Lord Alloway, after
 ' hearing parties, pronounced this interlocutor:—' Finds, that by
 ' the trust-deed in question, executed by John Earl of Stair, his
 ' trustees the defenders are directed, " after my debts and lega-
 ' cies are all paid, and a sum is set apart for payment of the an-
 ' nuities, or the same are otherwise well secured, I appoint my
 ' said trustees, or their foresaids, to lay out the residue of the
 ' trust-funds, and interest and proceeds thereof, in purchasing
 ' lands in the shires of Wigton or Ayr, or stewartry of Kirk-
 ' cudbright; and, at the sight and with the advice and consent
 ' of the Lord President of the Court of Session, and of his Ma-
 ' jesty's Advocate for Scotland for the time being; to annex the
 ' same to my entailed estate, by taking the rights and securities
 ' of the lands so to be purchased to the same heirs of tailzie, and
 ' under the same conditions, clauses irritant and resolute, con-
 ' tained in the disposition and tailzie of my lands of Culquhasen:—"
 ' Finds, that the pursuer is heir of entail, served and retoured to
 ' John Earl of Stair, conform to retour of his special service, by
 ' which he has right to the said lands of Culquhasen and others,
 ' and the procuratory contained in the entail thereof, and upon
 ' which he has obtained a charter of resignation from the superior :
 ' Finds, that it is only in this character of heir of entail that he
 ' has any claim under the trust-deed executed by the late Earl,
 ' and that the trustees are bound to convey to him merely in that
 ' character the lands purchased by them with the residue of the
 ' trust-funds: Finds, that John Earl of Stair died upon the 1st

‘ June last, and that no delay or tardiness has been pointed out March 29. 1825.
 ‘ upon the part of the trustees in the execution of their trust :
 ‘ Finds, therefore, that in hoc statu there is no claim upon the
 ‘ part of the pursuer for any interest that may have arisen upon
 ‘ the funds of the late Earl, from the time of his death upon the
 ‘ 1st June last; reserving to the pursuer to be heard in case any
 ‘ improper or unnecessary delay take place, whether he may not
 ‘ then be entitled to claim the interest of the residue of the funds
 ‘ not vested in lands, as a surrogatum for the lands so directed
 ‘ to be purchased and entailed upon him and the other heirs;
 ‘ and to the defenders their defences as accords.’ On advising
 a representation, his Lordship reported the case to the Court;
 and their Lordships, on advising informations on the 12th of
 February 1823,* sustained the defences and assolizied the re-
 spondents. Lord Stair then appealed, but the House of Lords
 ‘ ordered and adjudged, that the appeal be dismissed, and the
 ‘ interlocutors complained of affirmed.’ †

LORD GIFFORD.—My Lords, In a case in which the Earl of Stair is
 appellant, and Sir John Dalrymple Hamilton Macgill of Cousland, Ba-
 ronet, and others, are respondents, it appears that the late Earl of Stair,
 being possessed of a considerable estate in Scotland, under an entail,
 and being desirous of increasing that estate, by a trust-deed and settle-
 ment executed by him, December 1815, gave, granted, and disposed,
 ‘ to and in favour of Sir John Dalrymple Hamilton Macgill,’ and the
 other respondents herein, or such of them as should happen to survive
 him the said John Earl of Stair, and accept of the trust, and to the sur-
 vivors or survivor of them, and to the assignees of the trustees, all and
 sundry lands and heritages (other than, and excepting, those contained
 in any deed of entail executed by him); and also, all and sundry debts
 and sums of money, heritable and moveable, owing to him in England,
 or in Scotland, or elsewhere, in rents of lands, goods, gear, and move-
 able effects whatever, then pertaining and belonging to him, or that
 should pertain or belong to him at his death; with all writs relative to
 the same, (excepting therefrom the furniture in his house at Culhorn);
 and that in trust, for certain uses and purposes therein mentioned; viz.
 for the payment of all debts that should be resting and owing by him
 at his decease, and his funeral charges and expenses; and for payment
 of an annuity of L.50 sterling to Margaret Ferguson, daughter of the
 deceased James Ferguson of Craigdarroch, Esq.; and of another annui-
 ty of L.80 sterling to Jean Coilly, his late servant, and other several

* 2. Shaw and Dunlop, No. 187.

† See Reports of a subsequent case between the same parties, Vol. II. p. 414.
 (where the authorities will be found), and p. 614.; and 5. Shaw and Dunlop, 248.

March 29. 1825. legacies; and then he directed, by this instrument, that his trustees, and their foresaids, shall lay out the residue of the trust-funds, and interest and proceeds thereof, in purchasing lands in the shires of Wigton or Ayr, or stewartry of Kirkcudbright, and at the sight, and with the advice and consent, of the Lord President of the Court of Session, and of his Majesty's Advocate for Scotland for the time being, to annex the same to his entailed estate, by taking the rights and securities of the lands so to be purchased to the same heirs of tailzie, and under the same conditions, provisions, clauses irritant and resolute, contained in the disposition and tailzie of his lands of Culquhasen and others executed by him; and his Lordship appoints his said trustees, and their foresaids, to expedite charters and infeftments thereon in favour of the heirs of tailzie, and under the conditions aforesaid, and to get the dispositions thereof recorded in the Register of Tailzies. Then, for the more regular management of the trust, he authorized and empowered the trustees to appoint cashiers and factors under them, and to give salaries to each of them, and such gratifications to any other persons that might be employed by them in relation to the premises, as they should think fit; and for the encouragement of the trustees to accept of the trust committed to them, he declared them not to be liable for omissions, or in solidum for one another, but each to be liable only for his own actual intromissions; and he declared that they were to be paid out of the trust-estate all expenses disbursed by them, or any of them, in relation to the trust, and for which payment the account and receipt by the trustee disburser should be a sufficient voucher to the trustees, or their factors or cashiers; and he thereby nominated and appointed the trustees, and their foresaids, in trust, for the uses and purposes foresaid, to be his sole executors, universal legators and intromitters.

My Lords,—After the execution of this trust-deed, the Earl of Stair executed some other instruments, by which he directed legacies to be paid to the persons named in those instruments; and in the year 1819 he executed an English will, by which he gave and bequeathed L. 3000 to the Right Honourable Hugh Elliot, Governor of Madras, to be paid within six months after his death; another legacy to the Earl of Lauderdale; and then, as to all the rest, residue, and remainder of his personal estate in England, which should not consist of real or government securities, he directed his executors to convert the same into money, and, after payment of his just debts, to invest such money in government securities; and then he gave and bequeathed all such stock, together with all other stocks, funds, and securities, of which he might be possessed at the time of his death, to such uses, and for such purposes, as his Lordship had in and by a certain deed and writing, prepared according to the Scots form, executed by him, and bearing date the 18th day of December 1815, which is the instrument I first stated to your Lordships, declared of and concerning his personal estate; and as to all estates which at the time of his death should be vested in him

for any trusts whatever, or by way of mortgage, he thereby gave, devised, and bequeathed the same unto the same trustees, according to the nature and quality thereof, upon the trusts, and subject to the equity of redemption, which, at the time of his death, should be subsisting, or capable of taking effect therein; and he also, by the same document annexed to that instrument, gave other legacies.

March 29. 1825.

My Lord Stair died about June 1821, and in the following month of November an action of count and reckoning was raised by the present Earl of Stair, claiming, as heir of entail, an account from the trustees of the proceeds of Lord Stair's property, and claiming to be entitled to the interest and dividends thereof from the time of Lord Stair's death. I say, my Lords, he claimed it in the character of heir of entail:—he certainly did not do so by his first summons; but by the subsequent summons he so claimed it.

It was admitted at your Lordships' Bar, that the question raised in this case was not one which had occurred in any Scotch Court, on which there had been any decision:—The question raised being of this nature,—Though the property bequeathed by Lord Stair was, as I have stated to your Lordships, to be converted into land, and that land to be settled according to the entail of his estate of Culquhassen, and, therefore, not to be enjoyed in that shape by the parties to possess this property until so converted; it was contended on the part of Lord Stair, that it was not necessary for him to wait till that had taken place, but that being entitled as next heir of entail, he was entitled to the interest of this property before it was laid out in land. That question appeared to be untouched by any case in the Scotch Courts, and therefore reference was made to cases in the English Courts; and particularly to a case before the present Lord Chancellor, the case of *Sitwell v. Bernard*, in which it was contended, that, by analogy to that and the other decisions, my Lord Stair was entitled to the interest from the death of the late Earl of Stair. My Lords, it is true that this is purely a Scotch case; but, as it depended upon the general principles of equity, it was thought that recourse might be had to those decisions which have taken place in this country, proceeding on the general principles of equity. But, my Lords, unfortunately the analogy which my Lord Stair attempts to draw from those cases, does not bear out the proposition for which he contends; for, according to those cases, particularly that of *Sitwell v. Bernard*, the courts of equity in this country have proceeded upon this principle, that though no particular period has been limited by the testator or the grantor within which a conversion should be made, and although it may appear upon the face of the will, that, until that conversion, the interest and proceeds of the property should be applied as a principal fund in the purchase of land; yet, with a view to the general interest to be benefitted by the will or the instrument, as a rule of convenience the Courts here have said, that they will take the period of a twelvemonth after the death of the testator, as a reasonable period within which the trustees

March 29, 1825.

or executors may have been enabled to collect the property; and that, therefore, at the end of that twelvemonth, though the land may not have been actually purchased, they will consider it for the purposes of the will as invested, so as to give the benefit to those for whom the land was to be so purchased. In this case, my Lord Stair, though he has professed to proceed on these English cases, instead of waiting even to that period which, according to the English cases, is the proper period at which the beneficial interest of the party under the will is to commence, has raised his action within five or six months after the death of the late Lord Stair, contending, by this action, that he is entitled to the interest on this residue, not from any particular period after the death of the late Lord Stair, but from the very moment of his death. It is a little singular, my Lords, that he so proceeded, because I observe one of the instruments under which he claims title is the English will, and by that will one of the legacies is not to be paid till six months after his death; and if that is considered as an English will, the other legacies would not be payable till twelve months after the death of the testator. It is difficult, therefore, supposing that the analogy is to hold in this case of these English decisions, how Lord Stair can, on the principles of these decisions, contend that he is entitled to this from the death of the testator. No one can look into this instrument, without seeing that my Lord Stair contemplated that some period must elapse before this money was converted into land; for he directs that it shall be laid out, not in the first instance in land, but in government securities, and that the produce of these government securities shall afterwards be applied in the purchase of land. I think, looking at the whole of these instruments, no one can doubt that the late Lord Stair contemplated that this could not be immediately converted into land, so as to give an immediate benefit to his first tenant in tail.

But then it has been said at your Lordships' Bar, that although the action in this case does claim the property from the time of the death of the late Lord Stair, your Lordships might, under these circumstances, prospectively declare from what period he shall be entitled to the interest in this residue; and, my Lords, I have, in consequence of that view being presented, considered very attentively whether that can be done; but I do not see how your Lordships can, in this state of the case, be called upon so prospectively to decide. I observe by the defences the respondents say, that, at that period, they had laid out only a part of this in the land. Your Lordships are in ignorance what may have been done in the remaining part of that year, which, according to the English cases, was to be allowed to those trustees for realizing the property, and laying it out in land. Your Lordships have no case before you on which you would decide that question, even if you could with propriety be called upon to decide it.

But I must confess to your Lordships, that this is a most important

March 29. 1825.

question in the law of Scotland; Whether Lord Stair is now in a situation to call upon the Court of Session,—or whether he was, at the end of twelve months after the death of Lord Stair, entitled to call upon the Court of Session? I think that that question should be well considered in the Courts of Scotland, before your Lordships are called upon to pronounce a decision, which, it is admitted on all hands, would be a new decision in the law of Scotland; and whenever that question shall come before the Court of Session, I think it will be well deserving the consideration of the Court of Session, whether they may not think it right to adopt some such rule as has been adopted in this country; with a view to the general convenience of all parties having interests in such a disposition as this; because, looking attentively at the very elaborate and most able judgment of the Lord Chancellor in that case of *Sitwell v. Bernard*, it appears that the Courts in this country have applied that rule to all cases, seeing the difficulty of applying a rule to each particular case, to determine whether the trustees have been guilty of negligence in the disposition of the property. The difficulties of deciding in every particular instance have been found to be such, that the Court have felt it to be necessary, if I may use the expression, to cut the knot,—to lay down a general principle applicable to all cases,—thinking it more convenient so to do, than to enter into the circumstances of each case, and to determine each upon its circumstances. My Lords, that is a question which deserves the consideration of the Court below, whenever it is properly raised; but, in this case, looking to the form of the summons, which looks to the death of the testator, and the action brought at a period which no principle established by the English cases can justify, your Lordships cannot, I think, in this case, be called upon to decide that case hypothetically. If the question arises in this, or any similar case, it is most fitting that it should receive all the consideration it can receive in the Courts of Scotland; who may, for reasons which I may not be at present aware of, think that, though it may be convenient to lay down a general rule, the rule laid down in the English Courts cannot apply. I think, therefore, that your Lordships, by affirming the decision of the Court of Session, will not preclude Lord Stair from raising that question, which I will not now enter into, not knowing whether the trustees have yet laid out the whole of this residue or not. If Lord Stair shall be advised to bring another action, raising the question as to the period of twelve months, or any other period farther than that he has already made, that is, five months after the death of the testator, that question will be left quite untouched by your Lordships' affirmance of this interlocutor.

After the best consideration I have been able to give to this case, I can offer no other advice to your Lordships, than that the interlocutor of the Court of Session shall be affirmed; which sustains the defences for the trustees, assolzie the defenders from all the conclusions of the action against them, and decerns. The judgment of your

March 29. 1825. Lordships will be applied to the state of the cause at that time; and therefore, by affirming this decision, your Lordships will not preclude Lord Stair from raising any other question. I would, therefore, humbly propose to your Lordships to affirm the interlocutor pronounced by the Court of Session.

No. 12. MARY and ELIZABETH TURNBULLS, Appellants.—*Abercromby*:

JOHN TAWSE, W. S. surviving Trustee of Mrs ELIZABETH ANNE HAY or TURNBULL, Respondent.

Trust—Fee or Spes Successionis.—A mother who was vested in the fee of certain subjects, having conveyed them to trustees for the purpose, inter alia, of paying a specific sum of debt, an annuity to herself, and conveying the free residue to her children nominatim, on which infestment followed; and having thereafter executed a supplementary trust-deed, authorizing the trustees to dispose of the subjects for a larger debt than that specified in the first deed;—Held, (reversing the judgment of the Court of Session, and affirming that of the Lord Ordinary), That she was not entitled to execute the second deed, and that her children were entitled to have it reduced.

April 15. 1825. 2D DIVISION.
Lord Cringletie. THE late Colin Campbell bequeathed a legacy of L. 500 to his niece, Mrs Hay, wife of James Hay, exclusive of his jus mariti, for behoof of herself and children. With this money Mrs Hay purchased certain tenements in Edinburgh, the titles of which she took to herself in liferent and her children in fee. She had an only daughter, Elizabeth Anne, who married John Turnbull, merchant in Edinburgh; and on occasion of their marriage, Mrs Hay, on the 3d of August 1773, granted a disposition of the above subjects 'to and in favour of myself in liferent, during all the days of my lifetime, for my liferent use allenarly, exclusive of the said James Hay, my husband, his jus mariti, and unaffected by his debts and deeds, and to Elizabeth Anne Hay, my daughter, and her heirs and assignees whatsoever, in fee, heritably and irredeemably, all and whole,' &c. On the same day a contract of marriage was executed between Mrs Turnbull and her husband, by which, after certain provisions had been made, in her favour, Mrs Turnbull disposed the subjects 'to and in favour of herself and the said John Turnbull, her future husband, in liferent, for the liferent use of the longest liver of them two, and to the child or children of the marriage in fee; whom failing, to the heirs and assignees of the said Elizabeth Anne Hay, all and whole, &c.; but providing and declaring always, that the rents, maills, and duties thereof, shall neither be subject to the said John Turnbull's jus mariti, nor diligence, nor affectable

‘ by his debts, but shall remain secured as a peculium or fund
 ‘ for answering the said Elizabeth Anne Hay’s annuity, exclusive
 ‘ of the L. 20 before specified, in the event of her surviving her
 ‘ said husband, and for the behoof of the issue of this marriage;
 ‘ agreeable to the legacy and appointment of the before-mentioned
 ‘ sum of L. 500 bequeathed to the said Margaret Campbell, alias
 ‘ Hay, and her children, by Colin Campbell, Esq. deceased, by
 ‘ which legacy the whole heritable subjects above specified were
 ‘ purchased by her.’

April 15. 1826.

Of this marriage there was a son, Alexander; and two daughters, (the appellants), Mary and Elizabeth. In 1779, Mrs Turnbull sold the subjects, and with the price purchased other property in Portobello. The disposition which she obtained to this property, dated 28th May 1779, proceeded on the narrative, that ‘ Elizabeth Anne Hay, alias Turnbull, spouse of John
 ‘ Turnbull, merchant in Edinburgh, for herself, and in name
 ‘ and behalf of the children procreated betwixt her said husband and her, did, of the date of these presents, out of their
 ‘ own proper funds, being part of the price of certain subjects in
 ‘ Canal-street, belonging to her, exclusive of her husband’s jus
 ‘ mariti, and unaffectable by her husband’s debts and deeds,
 ‘ make payment to me, &c.; and the dispositive clause was to
 ‘ and ‘ in favour of Elizabeth Anne Hay, alias Turnbull, and the
 ‘ said John Turnbull, in liferent, for the liferent use of the longest
 ‘ liver of them two, and to the said Alexander, Mary, and Elizabeth
 ‘ Jane Turnbull, and their heirs, executors, and successors,
 ‘ in fee; whom failing, to the heirs and assignees of the said
 ‘ Elizabeth Anne Hay, alias Turnbull, heritably and irredeem-
 ‘ ably, declaring that the same should remain as a peculium or
 ‘ fund for answering the said Elizabeth Anne Hay’s annuity, and
 ‘ for behoof of the children of the said marriage, agreeable to the
 ‘ legacy and appointment of the before-mentioned sum of L. 500,
 ‘ bequeathed to the said Margaret Campbell, alias Hay, and her
 ‘ children, by Colin Campbell, Esq. deceased, with which legacy
 ‘ the heritable subjects in Canal-street had been bought, all as
 ‘ specified in said contract of marriage;’ but it was farther provided and declared, ‘ That although the fee of the said lands and
 ‘ others is provided to the said Alexander, Mary, and Elizabeth
 ‘ Turnbolls, yet, notwithstanding thereof, it shall be lawful to,
 ‘ and in the power of, the said Elizabeth Anne Hay, alias Turnbull, exclusive of the jus mariti or administration of her said
 ‘ husband, and unaffectable by his debts and deeds, and without
 ‘ the consent of her said children, to burden, feu, and dispose of

April 15. 1895. 'the said lands and others.' On this disposition infestment was taken in terms of it.

About the year 1804 Mr and Mrs Turnbull got involved in pecuniary difficulties, chiefly in consequence of the conduct of their son Alexander; and with the view of extricating themselves, Mrs Turnbull, with consent of her husband, on the 18th of April 1804, executed a trust-deed in favour of the respondent, John Tawse, writer to the signet, and certain other gentlemen, who were now dead. That deed proceeded on the narrative and consideration, 'that the expense incurred in the education of our son Alexander Turnbull, and in relieving him from 'embarrassments, in which he had imprudently involved himself subsequent to his apprenticeship, and his having commenced business on his own account, have, with other unforeseen misfortunes, rendered the contracting of debt by us unavoidable; and also considering, that from the infirm and 'valetudinary state of me, the said John Turnbull, I am unable 'to pay that attention to our affairs which their situation requires; from these considerations, and in order that the debts due by us may be speedily discharged at the least possible expense, and that the residue of the property belonging to me, the 'said Mrs Elizabeth Anne Hay, may be effectually secured to 'me and my said husband, under the declaration after-mentioned, and the longest liver of us in liferent, and to our daughters 'after-named in fee, our said son having already received much 'more than his proportion of the property and effects belonging 'to us, we have resolved, after full deliberation and mature 'consideration, to grant the trust-right and disposition underwritten, in favour of the persons after-named, in whom we have 'entire confidence, and who, at our earnest request and solicitation, have agreed to accept.' She therefore disponed the property to the trustees, with the most ample powers of sale, feuing, &c, and bound herself, her heirs and successors, to warrant and ratify their acts; 'but declaring always, as it is 'hereby provided and declared, that these presents are granted in trust, for the uses and purposes, and with and under the 'conditions, provisions, and declarations after expressed.' And then it proceeded to set forth these purposes:—'That is to say, in 'the first place, for the payment of the expense of executing this 'trust, and of all debts and sums of money, whether heritably 'secured or otherwise, which shall have been contracted, resting 'and owing by me, the said Elizabeth Anne Hay, preceding the 'date hereof; and particularly, without prejudice of the foresaid

April 15, 1825.

'generality, the several sums of money advanced and paid to
 'me, or for my behoof, by the said John Tawse, for the purpose
 'of relieving the said subjects of the arrears of feu-duty, and
 'paying certain other debts, and satisfying the claims of several
 'importunate creditors, amounting in whole, at the date hereof,
 'conform to an account to be subscribed by us as relative
 'hereto, to the sum of L. 258. 16s. sterling, and of the lawful
 'interest thereof from the date hereof until the same shall be
 'satisfied and paid.' 'In the second place, for payment to us,
 'the said Elizabeth Anne Hay and John Turnbull, and longest
 'liver of us, with and under the conditions and declarations
 'after expressed, of such an annual sum, in half-yearly pay-
 'ments, as the rents and feu-duties of the property hereby con-
 'veyed shall enable the before-named trustees to afford, after
 'payment of the debts due by us preceding the date hereof, or
 'the interest of the said debts, until the principal sums can be
 'satisfied and paid from the proceeds of the sales of the property
 'herein before conveyed.' 'Providing always, that in case I,
 'the said Mrs Elizabeth Anne Hay, should consider it for my
 'interest to possess the Tower at Portobello, part of the subjects
 'before-disposed, or to let the same and draw the rents thereof,
 'I shall, notwithstanding these presents, have full liberty so to
 'do, providing there shall be a sufficient fund arising from the
 'other subjects hereby conveyed, for payment of my said debts,
 'and answering the other purposes of this trust, but not other-
 'wise.' 'And it is hereby also provided and declared, that
 'whatever annual sum can be afforded to be paid to us aforesaid,
 'from the surplus of the said rents and feu-duties, shall neither
 'be subject to the jus mariti of me, the said John Turnbull, or
 'be affectable by my debts or deeds, or the diligence of my cre-
 'ditors; and the rents of the said Tower, and the said annual
 'sum, whatever it may be, shall be paid to me, the said Eliza-
 'beth Anne Hay, during my life, upon my own receipt, without
 'the consent of my said husband.' There was then a provision
 for appropriating the free residue, after the death of Mr and
 Mrs Turnbull, for the support of their daughters, the appel-
 lants. The third purpose of the trust was thus expressed:—'In
 'the third place, after the death of the longest liver of us, the
 'said Mrs Elizabeth Anne Hay and John Turnbull, our said
 'trustees, survivors or survivor of them, are hereby authorized
 'and empowered, with all convenient dispatch, to dispoise and
 'convey the free residue of the property herein before disposed,
 'or to pay and apply the proceeds thereof, to the use and behoof

April 15. 1825/

' of the said Alexander Turnbull, our son, and Mary and Eliza-
 ' beth Jane Turnbull, our daughters, in such shares and propor-
 ' tions as shall be directed by me; the said Mrs Elizabeth Anne
 ' Hay, by any writing under my hand; and in the event of my
 ' not executing any deed or writing to that effect, then to the
 ' said Mary and Elizabeth Jane Turnbull, our two daughters,
 ' equally and proportionally between them, share and share
 ' alike, and to the survivor of them, and the lawful issue of such
 ' of them as may die previous to the period of division; that is
 ' to say, the lawful issue of any of my said daughters shall draw
 ' the share which their mother would have been entitled to re-
 ' ceive, had she survived the period when the property hereby
 ' conveyed becomes divisible betwixt them; whom all failing, to
 ' the said Alexander Turnbull, their brother, and the heirs of
 ' his body; whom all failing, to my own nearest heirs or assign-
 ' nees whomsoever. And although the said Alexander Turnbull
 ' has already received more than his proportion of the property
 ' belonging to me the said Mrs Elizabeth Anne Hay, and is
 ' only here called to the succession of the residue, failing my
 ' said daughters and their issue, yet nevertheless I hereby autho-
 ' rize and empower the before-named trustees, in case no deed
 ' shall be executed by me making any farther provision to my
 ' said son, to pay to him, out of the residue and reversion of the
 ' said subjects, the sum of L.20 sterling, at the first term of
 ' Whitsunday or Martinmas that shall happen after the death of
 ' the longest liver of us, the said Elizabeth Anne Hay and John
 ' Turnbull, and that in full of all that he can ask or claim, by
 ' or through the decease of either of us, in any manner of way:
 ' And upon the residue, after deduction of the whole expense of
 ' executing this trust, being applied in manner before-mentioned,
 ' then the said trustees shall be exonerated of this trust, and my
 ' said children and foressaids shall be obliged to grant all deeds
 ' necessary for that purpose.' There was no provision for any
 reconveyance of the subjects to Mrs Turnbull, either in liferent
 or fee, or that the trustees should denude during their lives, or
 be exonerated by them.

On this deed infestment was taken, and the trustees entered into possession.

Thereafter the trustees, having paid debts or advanced sums to a much larger amount than were covered by the above deed, obtained on the 26th of May 1806 a new deed, called a supplementary trust-deed. This deed proceeded on the narrative of the execution of the former one, and ' that the chief purpose of

April 15. 1925.

'our granting the foresaid trust-disposition was for the payment
 'of certain debts contracted by me, the said Mrs Elizabeth Anne
 'Hay, and my husband, which debts arose principally from the
 'extravagance of our son, Alexander Turnbull, and other causes
 'unnecessary to be herein detailed: And as it is still the earnest
 'desire of me, the said Mrs Elizabeth Anne Hay, that these
 'debts, so far as approved of by me, should be paid by my said
 'trustees; therefore, and in order to remove every doubt which
 'might be otherwise entertained with respect to the power of
 'my said trustees, under the above-mentioned trust-deed, to dis-
 'charge the debts due by me and my said husband with safety to
 'all parties, we have by these presents,' &c. (then followed a con-
 'veyance of the property). 'But declaring always, as it is here-
 'by provided and declared, that these presents are granted in
 'trust, for payment of such debts due by me, the said Mrs Eli-
 'zabeth Anne Hay, and my said husband, as have already been
 'paid by my said trustees, or may hereafter be attested by me,
 'and paid by them, and contracted for the purpose of extricat-
 'ing me from difficulties occasioned by the imprudence of our
 'said son, and for the necessary support of my family; and par-
 'ticularly, for payment to the said John Tawse, his heirs and
 'successors, of the sum of L.825. 17s. 3d., being the amount of
 'the sums advanced and paid by him on my account preced-
 'ing the 1st day of April last, conform to an account thereof
 'subscribed by me and my said husband of the date hereof, as
 'relative hereto, with the legal interest of the said sum from the
 'said 1st day of April last, and in time coming during the not-
 'payment; and also in trust for the uses and purposes, and with
 'the powers and under the provisions, conditions, and declara-
 'tions contained in the trust-deed formerly executed.' And it
 'was farther declared, 'That whereas, by the former trust-deed,
 'an option is reserved to me, the said Mrs Elizabeth Anne Hay,
 'to possess the Tower of Portobello, part of the premises thereby
 'conveyed, if I should so incline, the option so reserved to me
 'by the said prior trust-deed is hereby renounced in favour of the
 'said trustees, with liberty to them to set, sell, and dispose of the
 'said Tower, in the same manner as the other subjects thereby
 'conveyed.' On this deed infetment was taken. Large ad-
 'vances, it was alleged, were on the faith of these deeds made by
 'the trustees for the support of Mrs Turnbull and her daughters,
 'and for payment of debts exigible from the property. In 1819,
 'the trustees, having advertised the subjects for sale, the appel-
 'lants and their mother presented a bill of suspension and inter-

April 15. 1825.

dict, which was refused by the Lord Ordinary and the Court on the 26th of November of that year. An action of reduction of the supplementary trust-deed was then instituted by the appellants and their mother, on the head, first, of fraud, (but which was not afterwards insisted in); and, secondly, ' Because the right of ' the said Elizabeth Anne Hay to the said subjects was merely ' fiduciary; in which subjects she had no patrimonial interest beyond her own liferent, and she had no right nor title to alienate ' or dispone the same to the prejudice of the pursuers, her children: Because, whatever right was in the person of the said ' Elizabeth Anne Hay to the said subjects, whether real or fiduciary, had been already irrevocably conveyed to the said defenders, in trust, for behoof of the said pursuers, exclusive of the ' jus mariti of the said John Turnbull, and of his debts and ' deeds, as well as of the debts and deeds of the said Elizabeth ' Anne Hay, by and in virtue of a previous deed of trust executed by the said Elizabeth Anne Hay, to and in favour of the ' said defenders, dated the 18th day of April 1804, and of an ' instrument of sasine following thereon, dated the 9th day of ' October, and recorded in the Particular Register of Sasines for ' the shire of Edinburgh the 19th day of November 1804: By ' which absolute deed of trust it was specially provided and declared, that the said subjects should remain in the defenders' ' hands " as a fund for answering the purposes provided in the ' contract of marriage between the said John Turnbull and her," ' and should be transmitted to the pursuers, the children of the ' marriage, unburdened with every debt of the said Elizabeth ' Anne Hay and of her husband; and which absolute and irrevocable deeds, granted in pursuance of the obligation contained in said contract of marriage, the said Elizabeth Anne Hay ' had no right, by any subsequent deed, and particularly by the ' supplementary deed under challenge, to alter, innovate, defeat, ' or frustrate the object and effect of.'

On hearing parties, Lord Cringletie, Ordinary, pronounced this interlocutor on the 19th of January 1820:—' The Lord ' Ordinary having heard parties' procurators on the grounds of ' redaction and defences, finds, that by antenuptial contract of ' marriage, entered into between the pursuer Mrs Turnbull, and ' her late husband John Turnbull, merchant in Edinburgh, she ' alienated and disposed certain houses belonging to her in Bristo ' and Canal-streets of Edinburgh, to and in favour of herself and ' the said John Turnbull, her future husband, for the liferent use ' of the longest liver of them two, and to the child or children of

April 15. 1825.

' the marriage in fee; whom failing, the heirs and assignees of
 ' the said Elizabeth Anne Hay, *i. e.* Mrs Turnbull herself; and
 ' the *jus mariti* of the said John Turnbull, in so far as related to
 ' these subjects, was anxiously excluded. Finds, that after the
 ' said couple had a son, named Alexander, and two daughters,
 ' Mary and Elizabeth Jane, the said Mrs Turnbull sold these
 ' houses, and with the price thereof purchased property in the
 ' village of Portobello; and as this was understood to be a sur-
 ' rogatum for the other which had been sold, the disposition bore
 ' that in its narrative, and conveyed the subject to Mrs Turnbull
 ' and her husband in liferent, for the liferent use of the longest
 ' liver of them two, and to the said Alexander, Mary, and Eli-
 ' zabeth Jane Turnbolls, and their heirs, successors, and assignees,
 ' in fee; and this disposition also excluded the *jus mariti*
 ' of the said John Turnbull in the receipt and administration of
 ' the rents, and contained a power to the said Mrs Turnbull, exclusive
 ' of the *jus mariti*, and without consent of her said children, to burden,
 ' feu, and dispose of the said lands and others. Finds, that she and
 ' her husband, having got into pecuniary embarrassment, took the
 ' resolution to extricate themselves therefrom, by paying off their
 ' debts, and to secure the free residue to their children; and accordingly,
 ' on the 18th of April 1804, they executed a trust-deed in favour of
 ' the defenders, the narrative of which details the difficulties in which
 ' they had been involved, and mentions, that from these considerations,
 ' and "in order that the debts due by us may be speedily discharged at
 ' the least possible expense, and the residue of the property belonging
 ' to me the said Elizabeth Anne Hay, (*i. e.* Turnbull), may be effectually
 ' secured to me and my said husband, under the declaration after-mentioned,
 ' and the longest liver of us, in liferent, and to our daughters after-named
 ' in fee, our said son having already received much more than his
 ' proportion of the property and effects belonging to us, we have resolved,
 ' after full deliberation and mature consideration, to grant the trust-right
 ' and disposition underwritten." Finds, that accordingly Mrs Turnbull
 ' conveyed her whole property to the defenders, with full power to feu,
 ' sell, and dispose thereof, either by public or private sale, but under
 ' trust always, 1st, For payment of the expense of executing the trust,
 ' and of all debts and sums of money, whether heritably secured or
 ' otherwise, which shall have been contracted by me the said Elizabeth
 ' Anne Hay preceding the date hereof; and particularly a debt due to the
 ' defender John Tawse of L. 258. 16s. : 2dly, The trustees were

April 15, 1825.

‘ to pay to Mrs Turnbull, exclusive of her husband’s right, such
 ‘ surplus as could be afforded of the rents and feu-duties of her
 ‘ property for her maintenance; and, 3dly, After the death of
 ‘ the longest liver of the said Mrs Turnbull and her husband,
 ‘ the trustees were taken bound “to dispoise and convey the free
 ‘ residue of the property herein before disposed, or to pay and
 ‘ apply the proceeds thereof, to the use and behoof of the said
 ‘ Alexander Turnbull our son, and Mary and Elizabeth Jane
 ‘ Turnbull, our daughters, in such shares and proportions as
 ‘ shall be directed by me the said Mrs Elizabeth Anne Hay by
 ‘ any writing under my hand;” and failing such writing, then
 ‘ to the two daughters equally between them. Finds, that the
 ‘ trustees, defenders, were infeft on said disposition, conform to
 ‘ instrument of sasine, dated 9th October, and registered 19th
 ‘ November 1804; and therefore, as this trust was executed for
 ‘ payment of debts contracted at its date, after the discharge of
 ‘ which the residue was to belong to the said Mrs Turnbull and
 ‘ her husband in liferent, and to their children pominatim in fee;
 ‘ and as their mother did not reserve to herself any power of
 ‘ contracting other or further debts, the fee of the residue was
 ‘ vested in the trustees for behoof of the children, and could not
 ‘ be injured or impaired without their consent. Finds, that by
 ‘ the death of the said Alexander Turnbull without heirs of his
 ‘ body, the right of the fee belongs to his two sisters the pur-
 ‘ suers; and therefore finds, that the second deed of trust in
 ‘ favour of the defenders, now under reduction, with all that has
 ‘ followed thereon, are void and null, in so far as the same are
 ‘ inconsistent with the former trust, and injurious to the pur-
 ‘ suers, Mary Gordon and Elizabeth Jane Turnbull; and re-
 ‘ duces, decerns, and declares accordingly. But in so far as this
 ‘ action proceeds at the instance of the said Mrs Turnbull her-
 ‘ self, assoilzies the defenders therefrom, in respect that although
 ‘ she libels that the deed under reduction was fraudulently elicited
 ‘ from her, yet her Counsel has not denied that she has
 ‘ received large advances of money from said trustees since the
 ‘ date thereof in 1806, and has thereby ratified the same: and
 ‘ decerns, reserving to the defenders to operate payment of what
 ‘ may be due to them on the first trust out of the trust-estate,
 ‘ and the surplus due on the second trust out of the liferent of
 ‘ the said Mrs Turnbull.’ Against this judgment the trustees
 ‘ lodged a representation; but the Lord Ordinary refused it, and
 ‘ observed in a note, ‘ The Lord Ordinary has no doubt that the
 ‘ intentions of the representers were pure; and, by the settled

‘accounts, every act of theirs has been approved by Mrs Turnbull; but he must be pardoned for observing, that their conduct has excited his utmost surprise. In 1804 Mrs Turnbull’s debts and her husband’s amounted to L. 258, and for payment of that the trust was created which is the basis of this action of reduction. Instead of paying off that debt, the representers have allowed it to arise to no less than L. 1888. 10s. 7d. How they could have accepted of the trust, and executed it in that way, must excite wonder in every one. Instead of paying off the small debt, they enlarged it eight-fold.’ A second representation was also refused by his Lordship, who explained, that his interlocutor proceeded ‘entirely on the point of law,’ and that any claim the trustees might have under the first deed was reserved entire.

The trustees then reclaimed to the Court.

Lord Craigie observed,—I differ in opinion from the Lord Ordinary. By the original deed granted by the grandmother the fee was vested in Mrs Turnbull, and by the marriage-contract the subjects were taken to her in liferent, and to the children nascituris in fee. This clearly constituted Mrs Turnbull the *fiar*. Then the property in Portobello was purchased with the price of the subjects of which she held the fee. By the disposition, no doubt, to this property, there is *ex figuro verborum* a liferent only in favour of Mrs Turnbull, and a fee in the children *nominatim*; but then this is qualified with a declaration, that she shall have power to feu and dispoise the property. Therefore it is plain that the fee was truly and substantially in Mrs Turnbull. Such was the state of matters when she executed the trust-deed of 1804. Now, unless the fee was expressly taken out of her by that deed, and transferred to the children, she must remain *fiar*. It is true that the intention seems to have been, to constitute her a liferenter and the children the *fiars*. But this, it will be recollected, is merely a trust-deed, intended for the benefit of the granter, and not an absolute conveyance; and it will be observed, that there is a clause which necessarily imports that she was *fiar*. No doubt after her death the children were to have right to the fee; but that merely gave them a *spes successionis*. As the fee therefore remained in Mrs Turnbull, she had power to grant the supplementary deed, and consequently the interlocutor must be altered.

Lord Glenlee.—The trust-deed of 1804 vested the fee in the trustees, and not in the children. Under that deed they had a mere *spes successionis*. The second deed was a most expedient

April 15. 1825.

April 15. 1825. one under the circumstances of the family. Even although it had not been granted, the trustees could not have been bound to denude till relieved of their advances authorized by Mrs Turnbull. But the present parties are her representatives, and could not insist on their conveying to them till they relieved the trustees; and as the action, so far as Mrs Turnbull is concerned, has been dismissed, and she has acquiesced, her representatives cannot stand in a better situation.

Lord Bannatyne thought the interlocutor right. By the deed of 1804 a fee was constituted in favour of the children, and therefore their mother could not grant the subsequent deed.

Lords Justice-Clerk and *Robertson* concurred with *Lords Craigie* and *Glanlee*; and the Court therefore, on the 7th of February 1822, altered, sustained the defences, and found the trustees entitled to expenses, payable out of the trust-funds. Against this judgment the appellants having reclaimed, and the Judges (with the exception of *Lord Bannatyne*, who now thought the Lord Ordinary wrong) having remained of their former opinions, the Court, on advising the petition with answers, adhered on the 12th of November 1822.*

The appellants, Mary and Elizabeth Turnbulla, appealed.

Appellants.—The terms of the deed executed by the grandmother and mother of the appellants, prove that the different properties acquired by them were intended as a provision for the children of the marriage between Mr and Mrs Turnbull. The jus mariti and debts of the former are specially excluded from affecting the estate, and the fee is destined to the children, first, nascituris, and, secondly, nominatim. Thus, Mrs Turnbull, in the disposition of the trust-subjects, is stated, ‘for herself, and in name ‘and behalf of the children procreated betwixt her said husband ‘and her,’ to have made payment of the price. Again, the disposition is to Mrs Turnbull and her husband in liferent, ‘and ‘to Alexander, Mary, and Elizabeth Jane Turnbull, in fee;’ and a declaration is particularly introduced, that the subjects are to remain as a ‘fund for behoof of the children.’ These anxious stipulations sufficiently evince the nature and intention of the parties. There can be no doubt that the interest of the children of the marriage was directly contemplated by the granter of the deeds, in pursuance of the provisions in the contract of marriage, and the settlement by Mrs Hay. The appel-

* See 2. Shaw and Dunlop, No. 1.

lants do not dispute that a power of administration was vested in Mrs Turnbull. Under the contract of marriage, this power arose from the doctrine of the Scottish law that a fee cannot be in pendente; therefore, although there was a direct conveyance of the property then settled to the children of the marriage nascituris, the power of alienation was in the parent. But still the children of the marriage had a *jus crediti* vested in them, which could not be gratuitously disappointed: The *jus crediti* of the heir of the marriage confers a corresponding obligation upon the father, which he is bound to implement; and therefore, although from the principle already stated he has the power of administration, yet he has no right to disappoint the *jus crediti* of the heir. Accordingly, a gratuitous disposition may be reduced; and although a deed granted for onerous considerations is good to the party in whose favour it is conceived; yet the granter remains liable to repair whatever damage the heir of the marriage thereby receives. Thus, if a special subject is conveyed to a person in liferent, and his children nascituris in fee, the father, in virtue of the power of administration possessed by him, may dispose it; but as he has no right to do so, any separate estate which he may have is responsible for the value received.

But, on the other hand, a proprietor who disposes to himself in liferent, and his children nominatim in fee, creates in them an absolute right of which he cannot deprive them. This he may do either directly by a deed in their favour, or through the intervention of trustees. Where a trust-disposition of land is executed in favour of certain trustees, and is delivered and completed by infeftment and registration, and if that trust-deed be not revocable or alterable, parties favoured by the purposes of the trust have a *jus quasitum*, which cannot be taken away from them at the pleasure of the granter of the trust afterwards expressed, but which it is the right and the duty of the trustees to give full effect to.

The appellants admit, that trusts may be made revocable, or alterable, either at the pleasure of the granter or his heirs, or at the pleasure of the granter only. In the first of these cases, parties favoured by the purposes of the trust have no right on which they can rely, until something has been done in their favour by the trustee, and under the trust, which has been allowed by the granter and his heirs to operate. In the latter, they can have no such reliance till the power of revocation has expired by the death of the granter.

April 15. 1825.

But where trusts are granted without any power of revocation or alteration, and these trusts completed by delivery, infestment, and registration, there emerges a duty in the trustees to execute the purposes of the trust, and a right in those persons in whose favour these purposes are expressed, which is wholly independent of the pleasure of the original grantor.

Respondent.—The doctrine laid down by the appellants regarding the nature and legal effect of trusts, is stated in terms by far too broad and unqualified; and if the notions expressed by them were correct, very serious doubts might be entertained of the soundness of many decisions pronounced by the Court. A trust may be so constituted as to produce all the effects which the appellants ascribe to trusts generally, wherever infestment and registration have followed; but the true doctrine regarding trusts in general is widely different from that laid down by the appellants. If the deed of trust declares totidem verbis, or by its particular structure indicates clearly, that the grantor intends to put an end to his own right and powers, and to vest a *jus quesitum* irrevocably in those who are favoured by the deed, undoubtedly a Court of law would be bound to give it that effect. But unless the grantor's intention to this purpose be made perfectly clear, either by express declaration, or by the particular structure of the deed he has executed, the respondent denies that the trust, though followed by infestment and registration, can have that effect, either according to sound principle, or the decisions of the Court. In all such cases it is held to be a question of fair construction, depending on the different clauses of the deed, and principally on the considerations which led to its execution, and the chief object which the trustor thereby had in view, how far he is to be considered as divested of all right and power over his property, and to what extent, whether absolutely, or only *sub modo*, a *jus quesitum* can be insisted on by those who are favoured in the deed.

If this rule of fair interpretation, which is founded on the presumed views and intention of the grantor, were not allowed to operate, a great degree of injustice would be the consequence. Men might be stripped of their property, as an effect of their own spontaneous deeds, although they never had any such effect in contemplation; and the grantees under such deeds would acquire rights, without either compact or onerous consideration, which they might hold as absolute and indefeasible, although that probably would have been the very last thing the grantor

would have conceded, if the question had been directly put to him when he constituted the trust. April 15. 1825.

There is another principle or rule of law which enters deeply into the present question; namely, that which is uniformly applied in construing grants from parents to children, which are viewed in a quite different light from those granted to strangers. Where the donee is a stranger, the law considers him to have purchased the right; the presumption being, that the owner would not convey away his property to a stranger without an onerous consideration. Care, therefore, must be taken in the deed of conveyance, that the expressions do not in any respect go beyond the intention, as effect would be given to it against the grantor in terminis. But a deed granted by a parent to his child, although expressed in the same terms, will not, by any means, have the same effect; for although a fee should be conferred per expressum on the child, the deed may be so construed that he have no fee at all, and instead of a vested right *de presenti*, have nothing more than a mere hope of succession.

Such being the established rules applied in the interpretation of trust-deeds, and of deeds by parents in favour of their children, whether granted in the shape of trust-deeds or otherwise, it is to be considered what ought to be held the just import and effect of the deeds of trust now in question.

It is to be remembered, then, in the first place, that Mrs Turnbull originally was the undoubted absolute proprietor of the subjects, both of those that were first purchased in Bristo-street and Canal-street, and those that were substituted in their place by purchase at Portobello. By the title-deeds of these respective subjects, she unquestionably had power to dispose of them as she thought fit; and previously to the constitution of the first trust, the appellants could not pretend to have any right in the subjects by which they could prevent her. Neither was she under any personal obligation to confer the property on them; nor is it alleged that she received any onerous consideration to induce her to do so. The disposition by her mother, Mrs Margaret Hay, to her, in 1773, as well as her own marriage-contract with Mr Turnbull in the same year, and the disposition of the Portobello subjects in 1779, do all of them import an absolute unqualified fee in Mrs Turnbull.

Now, it is a consequence of this absolute right in Mrs Turnbull, that the first trust-deed in 1804, upon which alone the appellants found their claim, was and could be nothing else, in as far as regards them, than a voluntary gratuitous deed on the

April 15. 1894.

part of their mother, and a deed which, in legal construction, could import only a mere destination, by way of family settlement, so as to give the children the hope of succession, as an eventual provision of the residue to them. This is fortified by attending to the object and terms of the trust. This object was payment of the granter's debts, and not the disposition of the property to the appellants; and accordingly, the only right declared in their favour is one to the residue, not to the subjects themselves.

The House of Lords ordered and adjudged, 'that the interlocutors of the 7th February and 12th November 1822, and the 25th January 1823, complained of, be reversed; and the Lords find, That the second deed of trust in favour of the respondent, now under reduction, and all that has followed thereon, in so far as the same are inconsistent with the trust-deed of the 18th April 1805, and injurious to the interest of the appellants, Mary Gordon Turnbull and Elizabeth Jane Turnbull, under the former trust-deed, are null and void; and reduce, decern, and declare accordingly: but in so far as the action proceeded at the instance of Mrs Turnbull, assoilzie the respondent therefrom, and decern.'

LORD GIFFORD.—My Lords, In this case of *Turnbull v. Tawse*, Mary Gordon Turnbull, and Elizabeth Jane Turnbull, daughters of John Turnbull, and William Jameson, husband of Elizabeth Jane Turnbull, are the appellants; and John Tawse, surviving trustee appointed by Mrs Hay, the widow of John Turnbull, is the respondent. This is an action brought by Mary Gordon Turnbull and Elizabeth Jane Turnbull, and their mother Mrs Elizabeth Anne Hay, for the purpose of reducing a trust-deed which had been executed by Mrs Hay in the year 1806, on the ground that the deed was inconsistent with a former trust-deed of 1804 by the same persons.

My Lords,—The circumstances out of which this action arose I will shortly state to your Lordships. It appears that in the year 1778 a settlement was made, upon the marriage of Mrs Elizabeth Anne Hay with Mr John Turnbull, of certain lands, of which Mrs Hay's mother was at the time possessed in liferent; and the disposition was made in favour of Mrs Elizabeth Anne Turnbull and John Turnbull, her husband, in liferent, for the liferent use of the longest liver of them, and to the child or children of the marriage, whom failing, to the heirs and assignees of Mrs Turnbull; but exclusive of the jus mariti of her intended husband, the limitation to the children being to the children in fee. As there could be no doubt that Mrs Turnbull was absolute fief of the subjects by the deed of 1773, in the year 1779 she sold the same, and laid out the price in the purchase of other sub-

April 15. 1825.

jects in the village of Portobello, consisting chiefly of seuing ground, now lying in the centre of the village. This took place in the year 1779; and there being children of the marriage then existing, they were, with propriety, included in the destination of the subjects, but in such manner as to preserve the rights of their mother *quæ fieri* perfectly entire. Accordingly a conveyance of those lands was taken in favour of Mrs Hay, alias Turnbull, and her husband, 'in liferent, for the liferent use of the longest liver of them two, and to the children, and their heirs and successors, in fee.' If the instrument had stopped there, there would have been no difficulty; but it proceeds, 'whom failing, to the heirs and assignees of Elizabeth Jane Hay.' So far as this conveyance regarded the children, it is stated that it was a mere destination of succession, not the immediate conveyance of a fee. This point was not left to depend upon mere legal construction, for the disposition contained a clause whereby it was expressly provided and declared, that although the fee of the said lands and others is provided to the daughters, yet notwithstanding thereof it shall be competent and lawful to and in the power of Mrs Hay, by herself alone; exclusive of the *jus mariti* or administration of her husband, and unaffectable by his debts or deeds, and without the consent of her children, to burden, feu, and dispose of the said lands and others.

My Lords,—In this state matters remained till the year 1804. It appears that at that time considerable debts had been incurred by Mr and Mrs Turnbull, principally, as it seems, to relieve the son Alexander from embarrassments; but at that time a trust-deed was executed by Mrs Turnbull, to which trust-deed it will be necessary for me to call your Lordships' attention, because on the construction of that instrument the question your Lordships will have to decide mainly depends.

My Lords,—That deed recites, that 'considering that the expense incurred in the education of our son, Alexander Turnbull, and in relieving him from embarrassments in which he had imprudently involved himself subsequent to his apprenticeship, and his having commenced business on his own account, have, with other unforeseen misfortunes, rendered the contracting of debt by us unavoidable; and also considering, that from the infirm and valetudinary state of me, the said John Turnbull, I am unable to pay that attention to our own affairs which their situation requires; from these considerations, and in order that the debts due by us may be speedily discharged at the least possible expense, and that the residue of the property belonging to me, the said Mrs Elizabeth Anne Hay, may be effectually secured to me and my said husband under the declaration after-mentioned, and the longest liver of us in liferent, and to our daughters after narrated in fee, our said son having already received much more than his proportion of the property and effects belonging to us,—we have resolved, after full deliberation and mature consideration, to grant the trust right and

April 15, 1825.

'disposition underwritten in favour of the persons after-named, in whom we have entire confidence, and who, at our earnest request and solicitation, have agreed to accept.' Therefore they disposed these lands at Portobello to those trustees on certain trusts, which are after expressed; in the first place, 'for the payment of the expense of executing the same, and of all debts, whether heritably secured or otherwise resting owing by Mrs Elizabeth Anne Hay, preceding the date thereof, and particularly, without prejudice of the foresaid generality, the several sums of money advanced and paid to me, or for my behoof, by the said John Tawse,' who is one of the trustees, 'for the purposes of relieving the said subjects of the arrears of feu-duty, and paying the claims of several importunate creditors, amounting in the whole, at the date hereof, conform to account to be subscribed by us as relative hereto, to the sum of L.258. 16s. sterling, and of the lawful interest thereof from the date hereof until the same shall be satisfied and paid.' In the second place, 'for payment to the said Elizabeth Anne Hay and John Turnbull, and the longest liver of us, with and under the conditions and declarations after expressed, of such an annual sum, in half-yearly payments, as the rents and feu-duties of the property hereby conveyed shall enable the before-named trustees to afford, after payment of the debts due by us preceding the date hereof, or the interest of the said debts, until the principal sums can be satisfied and paid.' And then there is a proviso, 'that in case Mrs Hay shall consider it for her interest to possess the Tower at Portobello, part of the subjects thereby disposed, or to let the same and draw the rents thereof, she shall, notwithstanding these presents, have full liberty to do so, provided there shall be a sufficient fund arising from the other subjects hereby conveyed for payment of my said debts, and answering the other purposes of this trust, but no otherways.'

Then it is also provided and declared, 'that whatever annual sum can be afforded to be paid us as aforesaid from the surplus of the rents and feu-duties, shall neither be subject to the jus mariti of the said John Turnbull, or be affectable by any of my debts or deeds, or the diligence of my creditors; and the rents of the Tower, and the annual sum, whatever it may be, shall be paid to me, the said Elizabeth Anne Hay, during my life, upon my own receipt, without the consent of my husband.' Then it is provided, that although the liferent of the surplus rent and feu-duties is provided to Mr Turnbull after the death of his wife, he should be bound and obliged to aliment and maintain the daughters in a proper and suitable manner. Then, in the third place, 'After the death of the longest liver of us, the said Elizabeth Anne Hay and John Turnbull, our trustees, and the survivors or survivor of them, are hereby authorized and empowered, with all convenient dispatch, to dispose and convey the free residue of the property herein before disposed, or to pay and apply the proceeds thereof to the use and behalf of Alexander Turnbull, our son,

and Mary and Elizabeth Jane Turnbull, our daughters, in such shares and portions as shall be directed by me, Mrs Elizabeth Anne Hay, by any writing under my hand; and in the event of my not executing any deed or writing to that effect, then to our two daughters equally and proportionally between them, share and share alike, and to the survivor of them, and to the lawful issue of such of them as may die previous to the period of division.' It then states, that Alexander Turnbull, the son, had received 'much more than his proportion of the property belonging to me, Mrs Elizabeth Anne Hay, and is only here called to the succession of the residue, failing my daughters and their issue; yet, nevertheless, I hereby authorize and empower the before-named trustees, in case no deed shall be executed by me making any further provision to my son, to pay to him, out of the residue and reversion of the subjects, the sum of £. 20 sterling at the term of Whitsunday or Martinmas that shall first happen after the death of us, Elizabeth Anne Hay and John Turnbull, and that in full of all that he can ask or claim by or through the decease of either of us in any manner of way; and upon the residue, after deduction of the whole expense of executing this trust, being applied in manner before-mentioned, then the trustees shall be exonerated of this trust, and my children and foressaids shall be obliged to grant all deeds necessary for that purpose.'

April 15. 1825.

My Lords,—After the execution of that deed in the year 1804, a second trust-deed—a supplementary trust-deed as it is called—was executed by Mrs Turnbull; and the question in this case for your Lordships' consideration will be, whether, after the execution of the first trust-deed, it was competent to Mrs Turnbull to execute this supplementary trust-deed, or at least to make any provision in it inconsistent with the first?

This second trust-deed recites the first trust-deed, and states also, that, by virtue of the precept of sasine therein contained, the trustees were infeft the 19th November 1804; 'that the chief purpose of our granting the foressaid trust-disposition was for the payment of certain debts contracted by me, Mrs Elizabeth Anne Hay, and my husband, which debts arose principally from the extravagance of our son, Alexander Turnbull, and other causes unnecessary to be herein detailed; and as it is still the earnest desire of me, the said Mrs Elizabeth Anne Hay, that these debts, so far as approved of by me, should be paid by my said trustees, therefore, in order to remove every doubt which might be otherwise entertained with respect to the power of my said trustees, under the above-mentioned trust-deed, to discharge the debts due by me and my husband with safety to all parties, we have by these presents, with joint consent, and taking burden as aforesaid, but always in supplement of the foressaid trust-deed, and without prejudice thereto, given, granted, alienated, and disposed to and in favours of the trustees, the subjects which were contained in these trust-deeds. Then she also makes over certain household

April 15. 1825. furniture and other articles, ' which furniture was lately attached by ' the creditors of my said husband by diligence and sequestration, and ' has been purchased by my trustees from the creditors at a valuation ' for my behoof; but declaring always, as it is hereby provided and ' declared, that these presents are granted in trust for payment of ' such debts due by me, Mrs Elizabeth Anne Hay, and my husband, ' as have already been paid by my trustees, or may hereafter be ' attested by me, and paid by them, and contracted for the purpose of ' extricating me from difficulties occasioned by the imprudence of our ' son, and for the necessary support of my family; and particularly for ' payment to John Tawse,' (who is one of the trustees), ' his heirs and ' successors, of the sum of L. 825. 17s. 2d. sterling, being the amount ' of the sums advanced and paid by him on my account preceeding the ' 1st of April last, conform to an account thereof subscribed by me ' and my husband of the date hereof as relative hereto, with the legal ' interest of the said sum from the 1st of April last, and in time coming ' during the not-payment; and also in trust for the uses and purposes, ' and with the powers, and under the provisions, considerations, and de- ' clarations contained in the trust-deed formerly executed by us above- ' mentioned, with this exception.' She then recites a power, which had been conveyed to her by the original trust-deed of 1804, to possess the Tower of Portobello; but she thereby renounces that power in favour of the trustees.

My Lords,—An action was brought in the year 1816 by Mrs Turnbull and her two daughters, her son being dead, to reduce this second instrument, so far as it was inconsistent with the trust; and the cause coming on before my Lord Cringletie, the Lord Ordinary, his Lordship pronounced this judgment:—(Here his Lordship read the interlocutor). The effect, therefore, your Lordships perceive, of this interlocutor was, to reduce the second trust-deed, in so far as it was inconsistent with the provisions of the first, the Lord Ordinary being of opinion that under the first the residue was vested in the trustees for behoof of the children. (His Lordship then took notice of the successive representations which were presented, and of the answers thereto, and read the interlocutors of the Lord Ordinary refusing the same).

My Lords,—Against this interlocutor the trustees reclaimed to the Inner-House; and on the 7th of February 1822 the first interlocutor was pronounced which has been appealed from, which is in these terms:—(Having read it, his Lordship proceeded), My Lords, this interlocutor was subsequently adhered to by another interlocutor of the 12th of November 1822, and by another interlocutor of the 28th of January 1823.

My Lords,—Against these interlocutors this appeal is brought to your Lordships; and the question which has been discussed below, and discussed at your Lordships' Bar, is upon the effect of this first trust-deed. Now, my Lords, I may perhaps state to your Lordships,

April 15. 1825.

that it is admitted not only at the Bar, but admitted distinctly in the respondents' case, that this is mainly a question arising altogether upon the construction of this first deed; but I will read to your Lordships the admissions made by the respondents in pages 6. and 7. of their case. They say that the appellants maintain, 'that where a trust-disposition of lands is executed in favour of trustees, and is delivered and completed by infestment and registration, then, if the trust-deed be not revocable or alterable in its express terms, parties who are favoured by the purposes of the trust have a *jus quæsitum* which cannot be taken away from them at the pleasure of the granters of the trust afterwards expressed; but to which *jus quæsitum*, on the contrary, it is the right and duty of the trustees to give full effect: in other words, that when such trusts are constituted, there emerges a right and duty in the trustees to see the purposes of the trust accomplished, and a right in the persons in whose favour the purposes of the trust are expressed, which is wholly independent of the original granter.'

In answer to this argument the respondents say, 'that the doctrine laid down by the appellants, regarding the nature and legal effects of trusts, was stated in terms by far too broad and unqualified; and that if the notions expressed by them were correct, very serious doubts might be entertained of the soundness of many decisions pronounced by the Court.' Then they state that they agree, 'That a trust might be so constituted as to produce all the effects which the appellants ascribe to trusts generally, wherever infestment and registration have followed, the respondent had no occasion to dispute. But he submitted, that the true doctrine regarding trusts in general was widely different from that laid down by the appellants. If the deed of trust declares *totidem verbis*, or by its particular structure indicates clearly, that the granter intends to put an end to his own right and power, and to vest a *jus quæsitum* irrevocably in those who are favoured by the deed, undoubtedly a Court of law would be bound to give it that effect. But unless the granter's intention to this purpose be made perfectly clear, either by express declaration, or by the particular structure of the deed he has executed, the respondents denied that the trust, though followed by infestment and registration, could have that effect, either according to sound principle or the decisions of the Court. In all such cases it is held to be a question of fair construction, depending on the different clauses of the deed, and principally on the considerations which led to its execution, and the chief object which the truster had in view, how far he is to be considered as divested of all right and power over his property, and to what extent, whether absolutely or only *sub modo*, a *jus quæsitum* can be insisted on by those who are favoured in the deed.' And I do not find, on looking through the reporter's notes, which contain a tolerably accurate account of the grounds upon which the Judges have proceeded in the Court below; I do not find the law thus

April 15. 1825. stated by the respondents is at all disputed by the learned Judges who have decided this case. It was also admitted, and I apprehend cannot be disputed on the cases cited, that if this disposition had been a disposition by Mrs Turnbull to herself and the children nominatim, that would have vested the fee in the children : but it is said, this being a mere trust-deed, the effect of these trusts is not the same as if it had been a disposition to the children immediately ; but that, looking at the whole structure of this trust, the Judges seem to have been of opinion that the fee was not so parted with by Mrs Turnbull ; that the trustees were trustees for the benefit of the children, but that there still remained in her that fee to be disposed of by her ; and therefore it was competent for her to execute this second trust-deed. And it would be far from me, after the difference which has existed in the opinion of the Court below upon that point, and more particularly when I observe this case has been a second time under the consideration of the Second Division of the Court of Session, it would be far from me to say, that this is not a question of considerable nicety and difficulty.

Several of the Judges seem to have been of opinion, that in the original trust-deed they collect an intention on the part of Mrs Turnbull to reserve to herself a right over these subjects ; and one of the Judges particularly lays great stress upon the epithet, ' free residue,' which is used in that deed, as implying that all that was intended to be reserved for the daughters, (who were the survivors of the children), was the residue of this property, after discharging all the debts and encumbrances during the lifetime of Mrs Turnbull. My Lords, undoubtedly, if that could be collected from this first instrument, I should agree in the conclusion which the Judges have drawn ; but looking at this first deed, it appears to me to have been most anxiously framed for this purpose, in the first place, certainly for the payment of the debts ; which was a part of the considerations which they had anxiously in view ; but after the discharge of those debts, it appears to me to have been the intention of Mr and Mrs Turnbull clearly to endeavour, if they could, and as far as they could, to preserve the residue of the property for themselves for their lives, and their children after their deaths ; and that the free residue, which they declare to be for the benefit of the children, is that residue which would remain after discharging the purposes of the trust-deed.

Now what were those purposes ? They were the payment of the debts then due ; and the language of the instrument in that respect cannot admit of any doubt in my opinion ; because, in looking to one part of this trust-deed, it expressly refers to the debts which were due previous to the date of that trust-deed ; and it was for the satisfaction of those debts the trustees had power to sell. After those debts were satisfied, the residue of the property is expressly required by the deed to be effectually secured to Mr and Mrs Turnbull in life, and the children nominatim. Now, if, as it then

stead, Mrs Turnbull could have done this by an immediate disposition to the children, it appears to me that still more could she do so by means of a trust executed in this way. Of the fee she clearly divested herself, and it was vested in the trustees.

April 15. 1895.

That being so, let us look at the subsequent instrument executed by her and her husband. It is an instrument, reciting that this is 'in supplement of the aforesaid trust,' and stating also that it is to be without prejudice to that trust-deed; 'therefore, in order to remove every doubt, which might be otherwise entertained with respect to the power of my trustees, under the above-mentioned trust-deed, to discharge the said debts due by me and my husband with safety to all parties, we have by these presents, with joint consent, and taking burden as aforesaid, but always in supplement of the foreshaid trust-deed, and without prejudice thereto, given, granted, alienated, and disposed, as we hereby give, grant, alienate, and dispoise, to and in favour of' the trustees, for the payment of those other debts. The question, as I have already stated, comes back then to this, What was the effect of the first trust-deed? For, if that trust-deed absolutely divested her of the fee upon the trusts of that settlement, and if there is nothing to be collected from that instrument to shew that she intended to reserve to herself that disposition which she exercised under the second deed, then the first must be held a valid trust-disposition, giving the property to Mrs Turnbull for her life, and giving to the children a vested interest,—if I may use an English phrase,—a vested interest in the residue which remained after payment of the debts. I observe the Lord Justice-Clerk states, that in the first instance he had doubted upon the circumstances; but that he was quite clear, that, at the time the first trust-deed was executed by Mrs Turnbull, she was absolute fiar of the subject, and might dispose of it in any way she thought proper; that her right to burden, sell, and dispose of it, was clear and undoubted; but the question was, whether, after she executed the first deed in 1804, she had the full right of disposition of that which she previously had enjoyed? and I have before stated, more than once, in that which I have had the honour to address to your Lordships, that the Lord Justice-Clerk, and the other Judges, were clearly of opinion, that if she had vested the fee nominatim in the children by immediate disposition, that would have been a good disposition by her; but the difficulty they had was, whether in the fair construction of this trust-deed, and the intention of the parties, to be collected from that instrument, she did not intend to reserve to herself the disposition over this property,—admitting that if that was not to be collected from that instrument, the fee would be well vested in the trustees, and that it was not competent to her afterwards to alter the disposition of that trust-deed.

My Lords, I have very anxiously considered this case when it was argued before your Lordships shortly before the holidays, and more

April 15. 1825. particularly on account of the opinions expressed by the learned Judges, shewing that this was a case of considerable difficulty and considerable nicety; but, after the best consideration I have been able to give this case in the course of the argument and since, it does appear to me, that under the first trust-deed the fee is well vested in the trustees, but vested in them in trust for Mrs Turnbull and her husband for life, giving a vested interest in the children in fee in the residue, and subject to the other trusts of that trust-deed. That being my view of the case, (the view taken by the Lord Ordinary), I feel it my duty to state to your Lordships, that, in my humble judgment, the interlocutors which have been pronounced by the Court of Session on the 7th of February and the 12th of November 1822, and the 25th of January 1823, ought to be reversed to that extent; and that your Lordships should reverse these interlocutors, finding that the first deed of trust in favour of the respondent, now under reduction, and all that has followed thereon, in so far as the same are inconsistent with the trust-deed of the 18th of April 1804, and injurious to the interest of the appellants, Mary Gordon Turnbull, and Elizabeth Jane Turnbull, under the former trust-deed, are null and void, and reduce, decern, and declare accordingly; but, in so far as the action proceeded at the instance of Mrs Turnbull, assoilzie the respondent therefrom, and decern. I ought to state to your Lordships, that no appeal is brought by Mrs Turnbull against the interlocutors in question,—the appeal is brought by the children; undoubtedly the second trust-deed is a good trust-deed as against Mrs Turnbull, as far as affects the Tower of Portobello, and the furniture she conveyed, and as far as it is not inconsistent in other respects with the original trust-deed, and the interests of the children; and therefore, my Lords, I should propose to this House to take care, in the decision you pronounce, not to affect that second trust-deed any further than it is inconsistent with the original deed in favour of the children. The judgment I have read to your Lordships will, I apprehend, leave the second trust-deed untouched, so far as it is not inconsistent with the first; will leave that deed whole and entire and unaffected, for the purposes for which it was intended by Mrs Turnbull, in respect of that property over which she had a power of disposition reserved to her by the original trust-deed. For these reasons I should humbly propose to your Lordships this should be the finding of the House.

Appellants' Authorities.—3. Ersk. 8. 38.; Gordon, Jan. 2. 1771, (15,579.); Coners against Nelson, 1781, (not rep.); Seton, March 6. 1793, (4219.)

Respondent's Authorities.—Lockhart, Feb. 19. 1819, (F. C.); Campbell, Jan. 14. 1801, (No. 11. Adjudication); 3. Ersk. 8. 35.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

JAMES CUNNINGHAME of Balgownie, Esq. Appellant.

No. 13.

ROBERT CUNNINGHAME, Son of the late ROBERT CUNNINGHAME,
of Bowerhouses, and his Trustees, Respondents.*Personal Objection.*—Circumstances under which (affirming the judgment of the Court of Session) a party was held barred from reducing certain deeds made in contravention of an entail.

IN 1762, John Erakine of Balgownie, Esq. advocate, was feudally vested in the lands of Balgownie and Thorsk, holding of the Crown, and of Poppletrees, holding of the family of Mar. He had also a personal right to certain subjects lying within the territory of the town of Culross, partly as heir-apparent of his father, and partly on dispositions in his own favour. On the 12th of June 1762, he executed an entail of the whole of these subjects in favour of himself and the heirs of his body; whom failing, of his nephew, the Rev. Robert Cunninghame of Comrie and Banton; whom failing, a series of substitutes. This deed contained prohibitions against selling, or altering the order of succession, fortified by a clause of irritancy, but no resolute clause; nor was there any prohibition against contracting debt; nor was there a clause of registration; and it was never recorded. It, however, specially provided, ‘that my said heirs, substitutes, and successors above-mentioned, shall be bound and obliged to enjoy, bruik, and possess my lands and other heritable subjects before disposed, by virtue of this present disposition and destination of succession, and infestments, rights, and conveyances to follow hereupon, and by virtue of no other right or title whatever; declaring hereby, that if any of the said heirs, substitutes, and successors before-named, shall at any time act or do in the contrair hereof, by selling, annalzieing, and disposing my said lands and estate, or any part thereof, except for the purposes above specified, or by altering the course of succession and destination above set down, or bruiking or enjoying the lands and other heritable subjects before disposed, by any title other than this present right, and infestments, rights and conveyances to follow hereupon, all and every one of such acts and deeds, with all that shall happen’ to follow or may follow thereupon, shall be ipso facto void and null, and of no force, strength, or effect, sicklike, and in the same manner, as if the

April 15. 1825.

2D DIVISION.
Lord Cringetie.

April 15. 1825. ' said acts and deeds had not been made, granted, done, acted, or committed.'

In 1767 John Erskine died without issue, and was succeeded by his nephew, the Rev. Robert Cunninghame. To the lands of Balgownie, Thorsk, and Poppletrees, Mr Cunninghame completed titles, under the above entail; but to the Culross subjects he completed his title in fee simple; and was infest in 1772. At this time the lands were affected by L.6000 of debts of the entailer, John Erskine, besides annuities to the extent of L.250. Mr Cunninghame was proprietor of the lands of Comrie and Banton, which, by his marriage-contract, were settled upon his children of that marriage. He sold these lands, and with part of the proceeds paid off the above debts, to which he took assignments in favour of a trustee, in order to be kept up against the entailed property, and the heir of entail. He also, with part of the price, purchased Bowerhouses.

Mr Cunninghame was twice married. By his first wife, he had a son John, who was the father of the appellant. By his second marriage, he had a son Robert, who was the father of the respondent.

On the 11th of August 1792, Mr Cunninghame executed an entail of Balgownie, Thorsk, and Poppletrees, which proceeded on the narrative, that he had made it ' for the purpose of rendering more effectual the intentions of the deceased John Erskine of Balgownie, advocate, my uncle, and for the better preservation of my family, and the continuance of my estate with my children, relations, and heirs of entail herein and after-described, and for certain other weighty causes and considerations moving me.' The substitution and series of heirs were precisely the same as in the deed of 1762: but several new conditions and prohibitions were introduced; and particularly that the heirs should bear the name and arms of Cunninghame of Balgownie,—should possess the lands in virtue of that deed and the one of 1762 jointly,—and should not contract debt; all of which were fortified by irritant and resolute clauses. He, however, reserved power to himself to alter or revoke the deed at any time during his life. At this time his son John was about to be married to a Miss Hutchison; and an arrangement was entered into between him and his father, by which John agreed to ratify the new entail, and the father to discharge his power of revocation. Accordingly, on the 27th of September 1792, a deed was executed by them, in which, in reference to the above entail, John was described as ' apparent heir of entail

‘of the said Robert in the said entailed estate;’ and it proceeded April 15/ 1822. on the narrative of being made ‘in contemplation of the marriage of the said John Cunninghame with Miss Jane Hutchison, eldest daughter of Mr James Hutchison, merchant in Barnetisland, and for the better preservation of our family, and the continuance of the said estate, by a permanent settlement thereof upon our children, relations, and heirs of entail above-named and described, and for certain other onerous causes and weighty considerations;’ and they therefore ratified the new entail in every respect, and bound themselves and their heirs to abide by it; in consideration of which Robert the father discharged his power of revocation, and of binding the estate with any sums except his onerous debts and suitable provisions to his wife and other children. In farther testimony of his ratification of the deed, John signed each page of it. On the 29th of November thereafter, an antenuptial contract was executed between John and Miss Hutchison, to which Robert was a party, and which proceeded on the narrative of the new entail, the ratification of it, and the power therein contained of making proper provisions out of the estate to the wives and younger children of heirs of entail; and therefore they bound themselves to invest Miss Hutchison in a certain jointure out of the land of Poppletrees, and secure certain sums to the children; and farther, Robert bound himself to pay to his son and wife during his own life, L.100 per annum, and also gave him L.100 of cash. On the same day, the new entail and ratification were recorded, and sasine was thereafter taken.

The subjects in Culross were not included in the above entail; and in addition to those to which he had succeeded, Mr Cunninghame purchased two portions of ground. The mansion-house was built, and the garden and part of the pleasure-grounds were formed on the former of these subjects, and the office-houses were erected on the latter; and also an addition made to the garden by means of them.

On the 14th of January 1795, Mr Cunninghame executed another deed of entail, embracing the whole of the Culross subjects, precisely in the same terms as the deed of 1792. This entail was ratified by his son John on the 4th of February; and both the entail and ratification were afterwards recorded, and investment taken. In December 1796, Mr Cunninghame, on the narrative of the above two entails, and of his desire to relieve the estate of debt, executed in favour of his son and the other heirs

April 15. 1894. a renunciation and discharge of the debts which he had hitherto kept up by a trust-assignment.

After having conveyed Bowerhouses to his son by his second marriage, Mr Cunninghame (the respondent's father) died, and was succeeded by John, who thereupon made up titles to the entailed properties, as heir of tailzie under the above deeds. Soon thereafter he brought an action, founding on his father's contract of marriage, by which Comrie and Banton had been provided to the heirs of the marriage, and also on the deeds of entail, (by which an obligation was imposed on his father's heirs-general to free the heirs of entail of all claims against him); and concluding against the respondent's father to have it found, that he was entitled to Bowerhouses as a surrogatum pro tanto for Comrie and Banton, and payment of L. 6000, as part of the proceeds of these lands which had been applied to the extinction of the debts chargeable against the entailed estate. The Court found him entitled to payment of the L. 6000; and on an appeal the case was settled by the respondent's father paying him L. 5000. John continued to possess under the entails till 1811, when he died, leaving a son, the appellant, who was then in minority, and to whom he named curators. These curators immediately proceeded to complete his titles to the above lands under the entails. Accordingly, he was served heir in special, as the eldest lawful son and nearest heir of tailzie of John under the entail in 1792, on which he was infeft in Balgownie and Thorsk holding of the Crown. In the lands of Poppletrees he was infeft on a precept of clare constat from the superior, also in the above character: and in regard to the Culross subjects, he was cognosed heir of tailzie as to those holding burgage, and got a precept of clare constat in that character from the Magistrates relative to those holding feu, in virtue of which he was infeft. On attaining majority he granted a discharge to his curators, which proceeded on the narrative of the entails and ratifications in 1792 and 1795; and that 'in virtue of the foresaid two dispositions and deeds of entail I succeeded to the whole lands and estate of Balgownie, Thorsk, and Poppletrees, and others;' and that 'they have rendered to me a full and particular account of the management of my affairs, and of the actings and intromissions of the factors foresaid, appointed by and acting for me and them; which accounts have been examined and found to be correct, and with which I am perfectly satisfied,' &c. He therefore ratified, approved, and confirmed 'the whole acts and deeds done by my said curators, or others authorized by them,

April 15. 1835.

‘in relation to the foresaid entailed lands and estates.’ He also, after his majority, obtained himself enrolled as a freeholder of the county of Stirling under the above titles. In 1818, and before the quadrennium was expired, he raised a summons of reduction of the entails and ratifications in 1792 and 1795, and of his own titles, and concluding to have it declared that these titles being reduced, ‘it ought and should be found and declared, by decree foresaid, that the said James Cunninghame, pursuer, must make up his titles to the foresaid lands, barony, and others foresaid, under and by virtue of the foresaid disposition and deed of entail executed by the said John Erskine in the year 1762, and the investitures following thereon, in favour of the said Reverend Robert Cunninghame, previous to the foresaid pretended deeds of entail, said to have been executed by him in the years 1792 and 1795, and ratified as aforesaid: And it ought and should be found and declared, by decree foresaid, that the titles to be made up by the said James Cunninghame, as aforesaid, will effectually carry right to him; as heir of provision under the destination and deed of tailsie of the said Mr John Erskine, to the said lands, barony, and others aforesaid.’

The chief grounds of reduction were, that the deeds were ultra vires of Mr Cunninghame, as he had succeeded to the lands under the entail in 1762, and that the appellants titles have been made up per incuriam, and while in minority. In defence the respondent stated, ‘1st, The late Reverend Robert Cunninghame had full power to execute the entail in 1792 and 1795 libelled, and sought to be reduced; 2d, The said entails were expressly ratified and homologated by the pursuer’s late father; they have been homologated by the pursuer himself; and, on the faith of their validity, the entailed estate has been discharged of debt to a large amount, and other important family transactions have been entered into, of all which the pursuer has reaped the benefit; so that, even if it were true that the entails sought to be reduced were ultra vires of the maker, the pursuer is barred personally exceptio from challenging them.’ On advising memorials, Lord Oringletie pronounced this interlocutor:—‘In respect that the Reverend Robert Cunninghame, grandfather to the pursuer, acquired debts due by his uncle John Erskine of Belgownie, the maker of the deed of entail, under which alone the pursuer now desires to possess his estate; which debts he kept up against the entailed estate; by taking assignments to them, either to a trustee for his behoof, or directly to himself, his heirs and successors; and in respect

April 15. 1825.

that, in consequence of the pursuer's father having ratified the deeds of entail now under reduction, the said Robert Cunninghame granted a discharge in favour of the heirs of entail, of said debts, amounting, as said in this memorial, p. 34. to no less than L.12,246. 17s. 5 $\frac{8}{12}$ d. sterling; which discharge proceeds on the narrative, that he had executed new entails of the lands contained in the entail by said John Erskine, in favour of the same series of heirs therein called to succeed; and that to render these entails the more effectual, he had resolved to free and relieve the said entailed estate of the debts contracted by his predecessors: And in respect that it thus appears to the Lord Ordinary that the pursuer, by succeeding to the said estate, freed and relieved of these debts, in the manner and for the purpose aforesaid, is to the same purpose as if the said Robert Cunninghame had not discharged these debts, but that the pursuer had succeeded to his grandfather and father as heir of line, and, as such, obtained right to these debts; finds, that he is barred personali exceptione from insisting in this process for setting aside the entail executed by his said grandfather, and ratified by his father; assoilzies the defenders, and finds them entitled to expenses.' To this interlocutor his Lordship subjoined the following note:—' It is said that the amount of debts, viz. L.12,246. 17s. 5 $\frac{8}{12}$ d., is made up of interest, but to what extent of interest is not specified; but it seems of no consequence. In general, the heir of entail is bound to keep down the interest of the entailer's debts, because, in general, heirs of entail cannot contract debts, and if they did not pay interest accruing during their possession, they would be contracting debts. But by Mr Erskine's entail, the heirs were under no restriction of contracting debts, and might have dissipated the whole estate; and in that view, Robert Cunninghame might have disposed the whole amount of L.12,246. to whom he pleased, as a good debt against the estate, instead of which he gave it to the heir of entail, in order to fortify his entail, and in consideration of the same having been ratified by his son and heir; and the pursuer, at this moment, enjoys the advantage thereof.' To this judgment the Court adhered; and on advising a reclaiming petition, with answers, they appointed the appellant, before answer, ' to give in an articulate confession and defence, in terms of the Act of Sederunt, of the facts which he avers and offers to prove in support of the conclusions of his libel; and in particular, stating the nature, extent, and local situation of the lands and other subjects in the last entail,

‘ which were not included in the first entail, explaining also the nature of the titles under which they have been possessed ; and along with the condescendence, to produce a copy of the claim upon which the petitioner was enrolled as a freeholder.’ On advising the condescendence, with answers, their Lordships, on the 20th of February 1823, ‘ adhered to the interlocutor of the Lord Ordinary brought under review, in so far as it finds that the petitioner is barred personali exceptione from insisting in this process for setting aside the entail executed by his grandfather, and ratified by his father ; and assoilzied the defenders, and found them entitled to expenses.’*

Lord Craigie was of opinion, that the entails in 1792 and 1795 were reducible ; that there had been no sufficient acts of homologation to bar the appellant from doing so, or setting aside his titles made up under these entails ; and that on the assumption that he abandoned the Culross subjects purchased by Mr Cunningham, the appellant could not be held to represent either him or his father.

Lord Glenlee thought that he was barred both by homologation, and as representing his father, from objecting to the deeds. He had taken up the Culross subjects, to which he had no right, except under the deeds quarrelled, or as heir of his father, and had after majority obtained himself enrolled a freeholder under these titles.

Lords Justice-Clerk and *Robertson* concurred with *Lord Glenlee*.

James Cunningham appealed.

Appellant.—The appellant had a *jus crediti* under the entail of 1762, of which he could not be deprived by the acts of either his grandfather or his father ; and therefore, and as they were bound to have possessed under that entail, the deeds executed in 1792 and 1795 were unwarrantable, and liable to be set aside. This has not been seriously disputed ; but it is said, that the appellant is barred by homologation from reducing those deeds. It is, however, settled law, that there is no homologation by taking benefit of a reducible deed ; and therefore the circumstance of his having possessed as heir, and being enrolled a freeholder, are irrelevant. So soon as he arrived at majority, he adopted means for setting them aside ; and nothing can be founded on what was

* See 2. Shaw and Dunlop, No. 207.

April 15. 1825.

done during his minority, nor can the discharge granted to his curators, which, although good to them, is *res inter alios quoad* the respondent. Neither can any weight be put on the circumstance, that, in erroneously making up his titles, his curators served him heir to his father, and that he in consequence got possession of the two trifling pieces of ground purchased by Mr Cunningham. They were incorporated with the rest of the property; and it would be contrary to all equity to hold, that by this mistake he was barred from vindicating his rights under the deed of 1762.

Respondent.—Unless the appellant admits the validity of the entails, he has no title to pursue, so far as regards the Culross subjects, seeing that they were held in fee-simple by Mr Cunningham, part having been acquired by successive titles made up in fee-simple, and prescription having taken place, and part by purchase. But, independent of this objection, he is barred from attempting to set them aside. He is the heir and general representative of his father who ratified the deeds. His titles were made up in virtue of these deeds, after attaining majority; and he approved of this having been done by the discharge granted to his curators. He got himself admitted a freeholder on these titles after his majority, and he enjoys possession of the Culross subjects, on which the mansion-house, offices, and gardens are situated, to which he can have no right, except either as representing his father and grandfather, or by virtue of the deeds in question; and besides, he has taken advantage of the discharge of the debts, amounting to L. 12,000. As the merits were not discussed in the Courts below, it is unnecessary to say any thing upon them till the question as to the personal bar is decided.

The House of Lords ‘ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.’

LORD GIFFORD.—My Lords, I will now beg to call your Lordships’ attention to the case of Cunningham against Cunningham, which was heard before your Lordships the day preceding the holidays, and on Tuesday last. This was an action brought by the appellant, to set aside certain entails executed by his grandfather, on the ground that they were *ultra vires* of the granter, in consequence of certain clauses in a previous entail, and that the titles made up in the appellant’s person were made up by his curators *per incuriam*, and were challenged within the quadrennium *utile*; concluding, therefore, that those titles might be reduced. It is sufficient for me to state to your Lordships, that in this action the interlocutor finally pronounced by the Court of

Session is, that they adhere 'to the interlocutor of the Lord Ordinary brought under review, in so far as it finds that the petitioner is barred 'personal exceptione from insisting in this process for setting aside 'the entail executed by his grandfather, and ratified by his father, and 'assolzie the defenders, and finds them entitled to their expenses; 'and decern accordingly.'

April 15. 1825.

I have stated to your Lordships, that this decision did not proceed on the merits of the case, but it proceeded on this ground, that by the acts of the appellant, Mr Cunninghame, done by him after he became of age, and the other facts stated in the papers, the Court considered that he had adopted and ratified, and in the language of the Scotch law, homologated those instruments which had been executed. My Lords, the grounds on which it was contended that the appellant had so homologated are stated in the papers, and were brought forward at your Lordships' Bar; and the question is, whether they are sufficient to satisfy the House that Mr Cunninghame had so homologated, as found by this interlocutor. It is sufficient for me to state to your Lordships, that after hearing the very able arguments at your Lordships' Bar, and maturely considering these arguments, it does not appear to me that there is sufficient ground for advising your Lordships to set aside that decision. It will be unnecessary for me to go into the various grounds which were adduced, to satisfy your Lordships that the appellant had homologated those instruments on the special circumstances, and indeed it is not usual, where it is proposed to affirm the judgment, to go into the merits of the case, and it does not appear to me on this occasion necessary to do so.

My Lords,—This is a case in which I shall say nothing about costs; because, unquestionably, it was a case which it was very fit should be brought before your Lordships for decision, involving very important points and very important interests. I shall therefore only move your Lordships, that the judgment be affirmed.

Appellant's Authorities.—Dict. voce Homologation, § "Taking the benefit," &c.; Munro, Feb. 13. 1810, (F. C.); Arbuthnot, July 4. 1792, (620).

Respondents' Authorities.—3. Erk. 3. 47.; Anderson, July 15. 1760, (5701.); Mackenzie, Dec. 4. 1767, (5665.); A. Bishop of St Andrew's, March 12. 1694, (5699.); Home, Jan. 1734, (5700.); 1. Erk. 3. 39.; Crawford, Jan. 1682, (5694.); Hay, Dec. 5. 1755, (5663.); Steele, Jan. 13. 1774, (5669.); 1. Bankt. 7. 90.; 1. St. 6. 44.

J. CAMPBELL—J. RICHARDSON,—Solicitors.

No. 14. RUNDELL, BRIDGE and RUNDELL, and Others, Creditors of the late ARCHIBALD LORD MONTGOMERIE, Appellants.

Right Honourable LADY MARY MONTGOMERIE, and CHARLES MONTOLIEU BURGESS, her Husband, Respondents.

Clause—Obligation.—A lady, after the death of her husband, having voluntarily offered to assign, for behoof of his creditors, the surplus rents of her estate, after allotting a certain part of them to her own use; and having calculated that thereby, and with other means, the debts would be paid in five years; and having granted an obligation and assignation, conveying her rents to commissioners for that purpose, but without restricting the period to five years;—Held, (reversing the judgment of the Court of Session), That the creditors were entitled to the surplus rents till their debts were paid.

April 15. 1825.

1st DIVISION.
Lords Gillies and
Meadowbank.

THE late Archibald Lord Montgomerie, eldest son of Hugh late Earl of Eglinton, was, in 1806, married to his cousin-german, the respondent, Lady Mary Montgomerie. Her landed estates amounted to about L. 20,000 a-year, and she had personal property to the amount of L. 100,000. In 1814, Lord Montgomerie died, leaving his pecuniary matters in great embarrassment. Soon after his death, and on the 16th of July 1814, a minute and statement was drawn up by the agents of Lady Montgomerie, presenting a view of his Lordship's affairs, for the purpose of being communicated to his creditors. From this it appeared that his funds were estimated at L. 34,000, and his debts at about L. 100,000. To meet the deficiency, it was stated, that 'as Lady Montgomerie has resolved to restrict her expenditure to L. 5000 a-year, and to allow the remainder of the free rents of her estate to be applied towards the extinction of the balance of the debt, it is calculated that the debts may, in this way, be all discharged in the course of five years, including the expenses necessary for carrying the arrangement into execution.' It was also proposed to sell to Lord Eglinton lands belonging to her, at the price of L. 22,000, to be applied in extinction of the debts, and to grant a commission to Lord Alloway, and Messrs George Russell, and Samuel Anderson, writers to the signet, for carrying her object into effect. Accordingly, the minute concluded with a docquet in these terms:—'Lady Montgomerie having fully considered the particulars before stated, approves of and agrees to the arrangement suggested; and has, accordingly, executed a commission in favour of Lord Alloway, Mr George Russell, and Mr Samuel Anderson, for carrying the same into execution, as well as for the

April 15. 1835.

‘ general management of her affairs. (Signed) MARY MONT-
‘ GOMERIE. Eglinton Castle, 16th July 1814.’ On the same
day she executed a commission in favour of the above gentlemen,
which, after conferring on them the most ample powers in re-
gard to the management of her estate, was thus expressed :—
‘ And farther, considering that there are debts in England and
‘ Scotland, contracted during the marriage between Archibald
‘ Lord Montgomerie, my late husband, and me, which, accord-
‘ ing to the claims that have been made, amount to about
‘ L.100,000 sterling, to answer which, the estate, whether real
‘ or personal, of the said Archibald Lord Montgomerie is nowise
‘ adequate; and that I have resolved to make up the deficiency,
‘ and pay off and discharge all these debts from the sale of the
‘ fee-simple lands, and the savings of the rents of the entailed
‘ estates as after-mentioned; and, in the mean time, I am in the
‘ course of making up a title by confirmation to the personal
‘ estate of the said Archibald Lord Montgomerie, as executrix
‘ qua relict to him; therefore,’ &c. Then follows a clause em-
powering the commissioners to sell the unentailed property spe-
cified in the minute, and binding herself to confirm these sales,
and grant all necessary dispositions, &c.; after which the deed
proceeds, ‘ As also, with power to my said commissioners, or
‘ commissioner, to sell and dispose of the personal estates of the
‘ said Archibald Lord Montgomerie, to which I am in the course
‘ of making up a title as aforesaid, except such part thereof as I
‘ may have occasion to retain, and to apply the prices and pro-
‘ duce of the foresaid whole subjects, heritable and moveable,
‘ together with the rents and profits arising from my other lands
‘ and estate, entailed and unentailed, with the exception of what
‘ may be required for defraying the expenses of my own esta-
‘ blishment, which at present I estimate may amount to L.5000
‘ a-year, towards the gradual payment and extinction of the
‘ foresaid debts—all as mentioned and contained, so far as the
‘ circumstances are at present known, in a statement and minute
‘ subscribed by me of this date, and bearing reference hereto;
‘ providing always, that the said commissioners shall be bound
‘ to hold just count and reckoning to me for their respective
‘ transactions and intromissions in virtue hereof. And, lastly,
‘ I hereby declare that this commission shall endure and con-
‘ tinue until the foresaid purposes are accomplished, so far as
‘ concerns the payment and extinction of the foresaid debts of
‘ the said Archibald Lord Montgomerie, and, quoad ultra, until
‘ the same is recalled by a writing under my hand.’ She then

April 15. 1826.

got herself confirmed executrix qua relict, and gave up a full inventory; and also administered in England. Thereafter, on the 1st of October of the same year, she executed the following deed:—‘I, the Right Honourable Mary Lady Montgomerie, considering that, by a statement and minute regarding the debts due by my late husband, Archibald Lord Montgomerie, subscribed by me on the 16th day of July last, I resolved to pay and discharge these debts, which were estimated at L.100,000 sterling, in the way and manner therein mentioned; and particularly, by a sale of certain lands held in fee-simple by me, and by restricting my expenditure to L.5000 sterling per annum, and allowing the remainder of my rents of my whole lands and estates to be applied, as they should be received, towards the extinction of the said debts; and for accomplishing inter alia this object, I granted a commission in favour of the Honourable David Cathcart, Lord Alloway, one of the Senators of the College of Justice, George Russell, writer to the signet, and Samuel Anderson, writer in Edinburgh, jointly and severally; and that this arrangement having been generally communicated to the creditors in the said debts, as well in England as in Scotland, they have signified their acquiescence in the same, upon my granting these presents: Therefore, I do hereby bind and oblige myself, my heirs, executors, and successors, to implement and fulfil the foresaid statement and minute, by making payment and satisfaction of the debts therein and before referred to, according to the foresaid estimated amount, and in the way and manner specified in the said state and minute, or as nearly so as circumstances will admit; and for this purpose I do hereby assign, convey, and make over, to and in favour of the said David Cathcart, George Russell, and Samuel Anderson, my foresaid commissioners, and the survivors or survivor of them, the sum of L.20,940. 6s. 7d. sterling, being the price of the lands of Bogside and others, sold by me to the Earl of Eglinton, conform to minute of sale executed by us upon the 21st day of September last; as also, the whole estate, real and personal, whether in England or in Scotland, to which I have right as administrator or executrix of the said Archibald Lord Montgomerie; and also, the whole rents, profits, duties and casualties of my lands and estates, as well entailed as unentailed, lying in the counties of Ayr, Lanark, and Renfrew; providing and declaring, that nothing herein contained shall subject me personally in payment of the foresaid debts, or in any other way impose a burden upon me

April 15. 1825.

‘ regarding the same, farther than to the extent of the funds and effects hereby conveyed ; but declaring that the foressaid obligation come under by me shall attach and be binding upon my heirs and representatives to the extent of what they shall take or succeed to through me ; and providing farther, that my said commissioners shall make payment to me, yearly, and each year, and by such payments as I may find necessary, the sum of L. 5000 sterling, free of all deductions whatever, and likewise free of the taxes payable from the house of Coilsfield, and the expense of maintaining the garden and grounds there ; and that so soon as the foressaid debts (an account and list of which is to be taken and made up by my said commissioners so soon as the same can be properly investigated) are fully paid and discharged, my said commissioners shall be bound to denude of these presents, and hold count and reckoning with me and my foressaids for the application of the funds and effects hereby conveyed. And I consent,’ &c. She then, with consent of the commissioners, granted a factory to a Mr Haldane, taking him bound to account to them for the rents. These several deeds were entirely the voluntary act of Lady Montgomerie, no demand having either been made, or being capable of being made, on her by the creditors. In consequence of them, the creditors desisted from taking any steps against the property left by Lord Montgomerie. In 1815 her Ladyship married Mr Montolieu Burges, the other respondent. Several of the preferable, and some of the personal creditors, were paid ; but in 1817 it was found that, in consequence of the great depreciation in land, the inability of the tenants to pay their rents, the property not having turned out so productive as had been calculated upon, and the debts being ascertained to amount to L.104,000, it would be impossible to discharge them within any precise definite period. A ‘ memorandum and proposal ’ was therefore addressed by her Ladyship and Mr Burges to the creditors, in which, after narrating the minute and statement, the commission, the property to be disposed of in part of liquidation of the debts, and that ‘ what part of the debts should remain after the application of this was proposed to be paid off gradually from the surplus rents of her Ladyship’s estates, after setting aside L.5000 a-year for herself ; ’ it proceeded to state, that the funds realized had fallen greatly below those which had been relied on ; that the rents, from the agricultural distress, could not be realized ; that many of the tenants must leave their farms ; that, if ‘ matters were to go on in this way, there is no

April 15. 1825.

‘calculating when the creditors may receive payment;’ that the commissioners had intimated a wish to withdraw; and that as some creditors are taking separate steps, ‘it is probable the result would be a judicial management under the authority of the Court of Session, which would be equally prejudicial to the interests of Lady Montgomerie, and of the creditors at large.’ It was then stated, that ‘in these circumstances Lady Montgomerie is disposed to make every sacrifice in her power for the immediate satisfaction of the creditors; and, upon their discharging the debts, she is ready to convey to them, or any trustee they may appoint, all that she has to dispose of, except the family plate, Coilsfield furniture, and the rents of her own entailed estate.’ This proposal was not acceded to by the creditors. In 1818 a correspondence was opened with them by Lady Montgomerie, through her agents and husband, with the view of a settlement; and several letters passed between them, in which nothing was stated on her part importing that her obligation was limited to five years, but rather the reverse. The creditors having refused the terms proposed, the commissioners, towards the end of 1819, brought a process of multiplepoinding and exoneration; and claims having been lodged for the appellants, creditors of Lord Montgomerie, on the one hand, and for Lady Montgomerie and Mr Burges on the other, the question came to be, Whether, by the above deed, she had assigned the surplus rents, after deducting the L.5000 payable to herself, for five years, or till the debts were paid, and without any limitation in point of time, so long as they were not extinguished? After ordering memorials, Lord Gillies, on the 15th of January 1822, pronounced this interlocutor:—

‘The Lord Ordinary having considered the mutual memorials for the parties, and whole process, finds, that the memorialist, Lady Montgomerie, at the date of her marriage with the late Lord Montgomerie, was possessed of a large personal estate, of a very valuable entailed property in land, and also of unentailed landed property to a considerable amount: Finds, that upon the dissolution of the marriage by the death of Lord Montgomerie, it appears that the whole of her Ladyship’s personal estate had been spent during the subsistence of the marriage, and that Lord Montgomerie owed debts besides to a large amount, far exceeding the value of the funds of every description left by his Lordship: Finds, that Lady Montgomerie having succeeded to nothing by the death of her husband, and representing his Lordship no otherwise than as having been

‘ confirmed his executrix qua relict, was not, in any respect, April 15. 1825.
 ‘ liable for payment of his debts, in so far as the same exceeded
 ‘ the amount of the inventory of his funds: Finds, that under
 ‘ these circumstances the memorialist, Lady Montgomerie, form-
 ‘ ed the intention of paying off the debts of her husband, and
 ‘ for that purpose, of disposing of a considerable part of her
 ‘ unentailed property, and also of surrendering the rents of her
 ‘ whole estate, reserving to herself out of the same only a suitable
 ‘ annuity for her maintenance; which rents, together with the
 ‘ price of the lands proposed to be sold, and the produce of Lord
 ‘ Montgomerie’s funds, it was calculated would be sufficient, in
 ‘ the course of five years, to pay the amount of his Lordship’s
 ‘ debts, as then estimated: Finds, that with those views Lady
 ‘ Montgomerie, on the 16th July 1814, subscribed a minute,
 ‘ which, after mentioning that Lord Montgomerie’s debts amount
 ‘ to L. 99,000, afterwards calculated at L. 100,000, specifies the
 ‘ funds left by his Lordship, which are valued at L. 50,000, in-
 ‘ cluding the family plate, valued at L. 8,000, and the furniture
 ‘ at Coilsfield, valued at the like sum, both of which were to be
 ‘ retained by the memorialist: Finds, that the minute proceeds
 ‘ to state, that, to provide for payment of the balance, certain
 ‘ lands therein mentioned can be sold to Lord Eglinton; and
 ‘ the price expected for them is calculated at L. 22,820; after
 ‘ which the minute proceeds in these words: “ As Lady Mont-
 ‘ gomerie has resolved to restrict her expenditure to L. 5,000 a-
 ‘ year, and to allow the remainder of the free rents of her estate
 ‘ to be applied towards the extinction of the balance of the debt,
 ‘ it is calculated that the debts may, in this way, be all discharg-
 ‘ ed in the course of five years, including the expenses necessary
 ‘ for carrying the arrangement into execution;” and thereafter
 ‘ the minute concludes in these words:—“ Lady Montgomerie
 ‘ having fully considered the particulars before stated, approves
 ‘ of and agrees to the arrangement suggested; and has, accord-
 ‘ ingly, executed a commission in favour of Lord Alloway, Mr
 ‘ George Russell, and Mr Samuel Anderson, for carrying the
 ‘ same into execution:” Finds, that, on the same date, Lady
 ‘ Montgomerie accordingly granted a commission in favour of
 ‘ the persons above named, which, proceeding on the narrative of
 ‘ her having resolved to pay off all the debts “ from the sales of
 ‘ the fee-simple lands, and the savings of the rents of her entailed
 ‘ estates, as after-mentioned,” empowers the commissioners to sell
 ‘ the lands specified in the minute, and also to dispose of the
 ‘ personal estate of the said Lord Montgomerie, to which the

April 15. 1835. ' minute states that she was in the course of making up a title,
 ' and to apply the prices and produce, together with the rents and
 ' profits of her other lands, with the exception of what may be
 ' required for defraying the expenses of her own establishment,
 ' which at present she estimates may amount to L.5,000 a-year,
 ' towards the gradual payment and extinction of the foresaid
 ' debts, " all as mentioned and contained, so far as circumstances
 ' are at present known, in a statement and minute subscribed
 ' by me of this date, and bearing reference hereto:" Finds, that,
 ' on the 1st of October following, Lady Montgomerie granted
 ' another conveyance in favour of the same commissioners,
 ' which, after mentioning the arrangement that had been made
 ' for payment of the debts, proceeds in these words:—" That this
 ' arrangement having been generally communicated to the cre-
 ' ditors in the said debts, as well in England as in Scotland, they
 ' have signified their acquiescence in the same, upon my grant-
 ' ing these presents; therefore, I do hereby bind and oblige
 ' myself, my heirs, &c. to implement and fulfil the foresaid
 ' statement and minute, by making payment and satisfaction of
 ' the debts therein and before referred to, according to the fore-
 ' said estimated amount, and in the way and manner specified in
 ' the said state and minute, or as nearly so as circumstances
 ' will admit." And with respect to the rents reserved by Lady
 ' Montgomerie, this deed provides, that " my said commissioners
 ' shall make payment to me yearly, and each year, and by such
 ' instalments as I may find necessary, of the sum of L.5,000 ster-
 ' ling, free of all deductions whatever, and also free of the taxes
 ' payable from the house of Coilsfield, and the expense of main-
 ' taining the garden and grounds there:" Finds, that, in so far
 ' as the foregoing writings imposed any obligation on Lady
 ' Montgomerie, the same was, in its nature, purely gratuitous,
 ' since her Ladyship neither stipulated nor received from the
 ' creditors in return any valuable consideration whatever, the
 ' reservation of the furniture at Coilsfield, and the family plate
 ' at a fair valuation, being a condition equally advantageous to
 ' both parties: Finds, that an obligation of this sort is to be in-
 ' terpreted in the most favourable manner for the memorialist,
 ' Lady Montgomerie, and must be explained and controlled by
 ' the understanding of parties, and by the views and inten-
 ' tions of the granter at the time of entering into it, as indi-
 ' cated by the terms of the minute which she then subscribed,
 ' and to which both the commissions granted by her Ladyship
 ' expressly refer: Finds, that the estimated amount of Lord

April 15. 1825.

‘Montgomerie’s debts on the one hand, and the amount of the
 ‘rents of her Ladyship’s estate on the other hand, formed the
 ‘basis of the arrangement agreed to by the memorialist; and
 ‘finds, therefore, that if it appears from the minute that the
 ‘memorialist at the time laboured under any material error as
 ‘to any one or both of these points, and was misinformed or
 ‘mistaken either as to the amount of Lord Montgomerie’s debts,
 ‘or with respect to the amount and permanency of her own
 ‘rental, the obligation undertaken by her must be limited and
 ‘restricted accordingly: Finds, that in the aforesaid minute, the
 ‘estimated amount of Lord Montgomerie’s debts is L.92,000,
 ‘or, as afterwards supposed, L.100,000: Finds it now stated, that
 ‘his debts greatly exceed the above-mentioned sum: Finds it
 ‘admitted by the creditors, that Lady Montgomerie is not liable
 ‘for said debts, in so far as the same exceed the estimated amount
 ‘of L.100,000 as at the date of the minute: Finds, that neither in
 ‘the minute, nor in the relative commission, is the amount of the
 ‘rent of Lady Montgomerie’s estate specified; but finds, that it
 ‘appears to have amounted, at the date of the minute, to about
 ‘L.20,000 yearly; and finds, accordingly, that in the minute it
 ‘is assumed as a ground for the proposed arrangement, that,
 ‘setting aside the sum reserved by the memorialist, the free rent
 ‘of the estate, together with the other funds allotted to the
 ‘same purpose, would be sufficient, in five years, to discharge
 ‘the debts: Finds it now stated, that in consequence of an
 ‘extraordinary depression in the value of landed property
 ‘and its produce, particularly felt in that part of the country
 ‘where the memorialist’s property is situate, the rents of her es-
 ‘tate are greatly diminished, and that the rents actually recovered
 ‘during the five years immediately subsequent to the date of the
 ‘minute and commissions fall greatly short of the rents which
 ‘were payable, or which the estate was calculated to yield, at the
 ‘period when the arrangement was agreed to: Finds, that not-
 ‘withstanding this change of circumstances, the creditors insist
 ‘that they are entitled to the free surplus rent, not for a period
 ‘of five years, but for a period altogether indefinite, viz. until
 ‘such time as those rents, together with the other funds before-
 ‘mentioned, shall be sufficient to pay Lord Montgomerie’s debts
 ‘to the extent of L. 100,000, as calculated at the date of the mi-
 ‘nute, with interest from that period: Finds it stated, that, ac-
 ‘cording to the present rental of the estate, the creditors would
 ‘thus be entitled to the rent for a period equal to the probable dura-
 ‘tion of Lady Montgomerie’s life: Finds, that such a claim on the

April 15. 1825. ' part of the creditors is inconsistent with what must be presumed
 ' to have been the understanding of parties at the period when the
 ' arrangement in question was made: Finds, that the obliga-
 ' tion undertaken by Lady Montgomerie will be sufficiently im-
 ' plemented by her commissioners making payment, as she pro-
 ' poses that they should do, to the creditors of the whole free
 ' rent which they received, or which, consistently with the rules
 ' of good management, they might have recovered from the
 ' estate, deducting the sum reserved by the memorialist for the
 ' period of five years posterior to the commencement of their pos-
 ' session under the commissions,—the commissioners also account-
 ' ing to the creditors for the price of the property which was
 ' sold to the late Earl of Eglinton: Therefore, in this multiple-
 ' poiding, prefers the creditors to the extent of the price afore-
 ' said, and to the extent of the five years' rents as aforesaid, and
 ' also to the extent of the whole of the funds of the late Lord
 ' Montgomerie, so far as the same are here in medio: quoad
 ' ultra prefers Lady Montgomerie to the whole sums in the hands
 ' of the raisers of the multiplepoiding, and decerns in the prefe-
 ' rences accordingly; and appoints the raisers of the multiple-
 ' poiding to give in a condescendence of the whole sums in their
 ' hands, specifying particularly the amount of the rents received
 ' by them during the five years for which the creditors are hereby
 ' found entitled to them.' The appellants having lodged a repre-
 ' sentation, and Lord Gillies having been removed to the Inner-
 ' House, Lord Meadowbank, on the 29th of May 1822, pronounc-
 ' ed this judgment:—' Recalls the interlocutor complained of, in so
 ' far as it finds " that the obligation undertaken by Lady Mont-
 ' gomerie will be sufficiently implemented by the commissioners
 ' making payment, as she proposes that they should do, to the
 ' creditors of the whole free rent which they received, or which,
 ' consistently with the rules of good management, they ought to
 ' have received from the estate, deducting the sum received by
 ' the memorialist for the period of five years posterior to the
 ' commencement of their possession under the commissions;"
 ' and appoints parties to debate; and quoad ultra supersedes
 ' consideration of the representation.' On hearing parties, his
 ' Lordship pronounced this interlocutor on the 14th of June:—
 ' Recalls hoc statu the interlocutor complained of, in so far as it
 ' finds, that the obligation undertaken by Lady Montgomerie
 ' will be sufficiently implemented by " the commissioners also
 ' accounting to the creditors for the price of the property which
 ' was sold to the late Earl of Eglinton," these words forming the

April 15. 1825.

‘ conclusion of the finding recalled *hoc statu* by the interlocutor
 ‘ of the 29th ultimo; and farther, recalls the words “ as afore-
 ‘ said,” in that part of the interlocutor which prefers the creditors
 ‘ “ to the extent of the five years’ rents as aforesaid;” quoad ultra
 ‘ refuses the representation, and adheres to the interlocutor com-
 ‘ plained of.’* Both parties having reclaimed, the Court, on the
 14th of January 1823, pronounced this interlocutor:— ‘ Recall the
 ‘ interlocutors of the Lord Ordinary, dated the 29th of May
 ‘ and 14th of June 1822, in so far as they alter the interlocutor
 ‘ of the Lord Ordinary dated the 15th of January 1822; and
 ‘ they accordingly refuse the desire of this petition for Messrs
 ‘ Rundell, Bridge and Rundell, and adhere to the interlocutor
 ‘ of 15th January 1822 reclaimed against; but reserve consider-
 ‘ ation of the point, what shall be considered as sufficient dili-
 ‘ gence upon the part of the commissioners of Lady Montgomerie
 ‘ in the management of the trust committed to them.’ And on
 the 12th of February 1823 their Lordships refused a petition
 without answers.†

Lords President, Hermand, and Gillies, were of opinion that
 the obligation was limited to five years. Lords Succoth and
 Balgray, on the contrary, held that there was no such limitation.

Messrs Rundell, Bridge and Rundell, and the other creditors,
 appealed.

Appellants.—Although it is true that the obligation contracted
 by Lady Montgomerie was purely voluntary on her part, yet she
 thereby effectually bound herself; and in reliance upon it, the
 creditors abstained from adopting any steps against the estate of
 her husband. It was an obligation proceeding on good and suf-
 ficient considerations; and therefore it is irrelevant to say, that
 she received no actual value. A cautioner gets no direct value
 for his obligation; but, nevertheless, he is as effectually bound

* It is stated in the respondent’s case, p. 7. that ‘ it was the intention of both the
 ‘ Lords Ordinary to find, that Lady Montgomerie’s engagements to the creditors
 ‘ would be sufficiently fulfilled by her commissioners accounting for the five years’
 ‘ surplus rents, reserving the consideration of the question, how far they were bound to
 ‘ use strict diligence in the recovery of those rents. But Lord Meadowbank’s inter-
 ‘ locutor, instead of qualifying in that way the finding in Lord Gillies’s interlocutor, had
 ‘ recalled that finding altogether. This defect, which on the part of his Lordship was
 ‘ plainly unintentional, he would no doubt have rectified as soon as it was pointed out
 ‘ to him in a representation; but the creditors in the mean time having prepared a peti-
 ‘ tion to the Court against the principles of the interlocutor, the respondents were
 ‘ obliged to present a short petition also.’

† See 2. Shaw and Dunlop, No. 168.

April 15. 1825.

as if value were paid to him. Neither is it relevant to relieve a party, either in law or equity, that the calculations which he may have made for his own guidance in entering into it have not been realized, or that his means of implementing it have by subsequent events been taken away. Still the obligation subsists; and therefore the only question here is, what is the import and construction of the obligation? It is said by the respondent, that it is limited to five years; but there is no such limitation either in the obligation itself, or in the commission, or in the minute and statement. In the latter, no doubt, it is said, that 'it is calculated that the debts may in this way be all discharged in the course of five years;' but this was a mere matter of calculation, held forth to induce the creditors not to proceed against the estate, and was not a limitation or restriction. Accordingly, no condition of that nature is inserted in the obligation itself; and both the memorandum, and subsequent correspondence, evidently proceeded on the footing that there was no such limitation.

Respondents.—The obligation being purely a voluntary and gratuitous deed on the part of Lady Montgomerie, must be construed in the most favourable way for her; and, in judging of its meaning, the whole circumstances must be taken into view. It cannot be supposed that, out of an income of L. 20,000, she meant to restrict herself during her life to an annuity of L. 5000. Accordingly, in the minute and proposal, the contemplated period was only five years, and which, if matters had not entirely changed, would have yielded a sufficient surplus to pay the debts. It is true, that it is not expressly stipulated in the obligation that it shall endure for only five years; but the minute is specially referred to, and the terms of it must be held as incorporated in it. In these circumstances, therefore, she cannot be considered as having pledged the rents of her estate for an indefinite period; and if not so, then that period must be the one specified in the minute forming the basis of the obligation.

The House of Lords found, 'that under the commission, bearing date the 16th of July 1814, and the deed of obligation and assignation, bearing date the 10th October 1814, the said commissioners are bound to apply the rents of the estates mentioned therein, after making payment of the sum therein mentioned to Lady Montgomerie, and of the sums and expenses therein provided for, in discharge of the debts due by the late Lord Montgomerie, until thereby, and with the other funds mentioned in the foregoing instrument, the same debts shall

‘ be paid and extinguished. It is therefore ordered and ad- April 15. 1825.
 ‘ judged, that so much of the interlocutors complained of as is
 ‘ inconsistent with the above findings, be reversed; and it is
 ‘ further ordered, that the cause be remitted back to the Court of
 ‘ Session, to do therein as shall be consistent with this judgment,
 ‘ and as shall be just.’

LORD GIFFORD.—My Lords, I am to call your Lordships’ attention to an appeal in which Messrs Rundell, Bridge and Rundell, and others, creditors of the late Archibald Lord Montgomerie, are the appellants; and the Right Honourable Lady Mary Montgomerie, now the wife of Charles Montolieu Burges, Esq. and the said Charles Montolieu Burges for his interest, are the respondents.

My Lords,—It may be necessary for me, before I state the interlocutors against which this appeal has been brought, to state to your Lordships shortly the circumstances which have occasioned the litigation in question. It appears that the late Lord Montgomerie, in 1806, was married to Lady Mary Montgomerie, who appears to have been a lady of very large personal property, and a landed estate estimated at L.20,000 a-year. Lord Montgomerie died in the year 1814, and it appeared that at his death he left debts to a very large amount, amounting altogether, as they were then estimated, to L.100,000. The property which he left of his own, and which was applicable to the payment of his debts, was not equal to his debts. It appeared that the property, at a valuation, amounted only to L.50,000, from which Lady Montgomerie wished to retain a portion, namely, the furniture at Coilsfield, valued at L.8000, and the family plate, valued at L.8000; so that those two portions of the property being deducted, there remained only L.34,000 applicable to the payment of his debts, except these two portions of property, for which, of course, she must be debited. Lady Montgomerie appears to have been very anxious, from a very honourable feeling, that all his debts should be discharged, and therefore she proposed to appropriate part of her own property immediately, retaining to herself an income of L.5000 a-year, and to appropriate also the surplus rents of the other part of the property in liquidation of those debts.

In consequence of that determination, a minute and statement, as it is called, to which I shall have to call your Lordships’ attention more particularly by and bye, was, upon the 16th of July 1814, drawn up, giving on the one hand the estimated amount of the debts, and on the other the property, which, I have already stated, Lady Montgomerie proposed to render applicable to the payment of these debts; and then stating the deficiency, and containing this clause:—‘ As Lady Mont-
 ‘ gomerie has resolved to restrict her expenditure to L.5000 a-year,
 ‘ and to allow the remainder of the free rents of her estate to be ap-
 ‘ plied towards the extinction of the balance of the debt, it is calcu-

April 15. 1825. 'stated that the debts may in this way be all discharged in the course of five years, including the expenses necessary for carrying the arrangement into execution.' The minute then went on to make a statement relative to some property which was sold to Lord Eglinton for L. 22,000; and then it concluded in this way:—' Lady Montgomerie having fully considered the particulars before stated, approves of and agrees to the arrangement suggested, and has accordingly executed a commission in favour of Lord Alloway, Mr George Russell, and Mr Samuel Anderson, for carrying the same into execution, as well as for the general management of her affairs. (Signed) MARY MONTGOMERIE. Eglinton Castle, 16th July 1814.' My Lords, it appears, on the same day, that a commission was executed; and at a subsequent date, in the month of October in the same year, to satisfy the creditors, another deed was executed, which is called a deed of fulfilment.

My Lords,—After these instruments were executed, and the estates thus put under the management of these commissioners and trustees in the year 1815, it is within your Lordships' recollection that a considerable depreciation of land took place, and Lady Montgomerie's estates, in common with most of those in that part of the kingdom as well as this, suffered a great diminution in annual income. It was soon found, therefore, that the calculation which had been made of those debts being to be paid off in five years by this appropriation was incorrect. Accordingly, the creditors becoming clamorous in the year 1817, another memorandum was prepared, to which I shall have to call your Lordships' attention. My Lords, I should have stated to your Lordships, that Lady Mary Montgomerie, in the year 1815, married Mr Burges.

Disputes arising between the commissioners and Lady Montgomerie as to the effect of those arrangements which had been made, in the year 1818 or 1819 an action of multiplepoinding, as it is called, was raised by the trustees, and which was brought for the purpose of obtaining the opinion of the Court of Session upon the construction of those deeds; it being contended on the part of Lady Montgomerie, that her intention, to be collected from the papers, (and therefore the arrangement must be so construed), extended only to this, that she devolves only the surplus funds of her estates for a period of five years; and therefore, that if, at the expiration of those five years, the surplus rents were insufficient to pay the creditors, the creditors must be content with what they could get from that surplus; but that the deed was then to end. On the other hand, it was contended by the creditors, that it was clear in their judgment that Lady Montgomerie's obligation did not cease at the expiration of the period of five years; and that although, through the depreciation in the value of the property, it might be a considerable period before those rents would liquidate the debts, the trustees were bound to apply the surplus rents in liquidation of the debts till they were satisfied,

My Lords,—This coming on before the Lord Ordinary, my Lord Gillies, he, on the 15th of June 1822, pronounced a very elaborate interlocutor, stating the circumstances which I have already detailed to your Lordships. (His Lordship then read the interlocutor).

April 15. 1825.

After that interlocutor was pronounced, Lord Gillies was removed into the Inner-House, and this interlocutor having been represented against by the appellants, came before Lord Meadowbank, who made some alteration in it, which it is unnecessary for me to state. The interlocutor afterwards came before the First Division of the Court of Session, and they pronounced an interlocutor in the month of January 1823, which interlocutor is as follows:—(His Lordship then read it).

My Lords,—A reclaiming petition was presented to the First Division; which came on, and on the 12th of February 1823 a second interlocutor was pronounced. I should state to your Lordships, that a very considerable difference of opinion was entertained by the Judges of the First Division. Lord Gillies, before whom it had been originally as Lord Ordinary, continued of the same opinion which he expressed in the interlocutor which I have stated to your Lordships; the Lord President agreed with him, and likewise my Lord Hermand; but the two other Judges, Lord Succoth and Lord Balgray, were of a contrary opinion. The majority, of course, prevailed, and the creditors have brought these interlocutors before your Lordships for your consideration.

My Lords,—It has been stated at the Bar, and is stated in these papers, that this must be considered in a great measure as a voluntary obligation entered into on the part of Lady Montgomerie; and that, therefore, if there is any doubt upon its construction, it ought to receive the most favourable construction. No question is made upon this proceeding, nor do I see how such a question could be raised with respect to her being bound by these instruments; but the only question which has been argued, is upon the construction of these instruments. Undoubtedly, my Lady Montgomerie was not legally liable beyond the extent of the property acquired with her husband, and which was applicable to the payment of his debts; but from that feeling which is most praiseworthy in her, she appears to have had a great desire and a great wish that her husband's memory should not be tarnished in any respect by the debts he had contracted remaining unpaid. Her desire appears to have been, that those debts might be paid; and the only question, as I stated to your Lordships, is, whether, from the language in which this minute is drawn, which it is contended was the basis of the contract, and is therefore to be taken in conjunction with the other instruments, the other instruments referring to the minute and statement, whether, taking both in conjunction, that minute and statement does contain any restriction and limitation of the period during which these rents were to be applied to the payment of the debts?

April 15. 1825.

I will now, therefore, call your Lordships' attention more particularly to that minute, and to the other minutes which were prepared, one at the time, and the other at a period four or five months posterior to it. My Lords, this minute and statement appears to be made out by Lady Montgomerie's agent, submitted undoubtedly to her; and, as I collect, afterwards submitted to the creditors. The minute begins by stating the supposed amount of the debts due by Lord Montgomerie, which is stated to be in London L.60,000, in Scotland L.30,000, and in the country L.9,000, constituting by the state of Mr Dunlop, the agent, such a total as I stated to your Lordships of L.99,000. It then proceeds to say,—‘By Mr Dunlop's account it would appear, ‘that the rents of the estate for crop and year 1813 have been paid ‘and exhausted, excepting an arrear of about L.1500 sterling.’ So that there was an arrear of rents. ‘Therefore, there is no fund for ‘answering the above debt of, say L.100,000 sterling, except what ‘will arise from the following sources.’ It then states the particulars of the property belonging to Lord Montgomerie,—the above arrear of rent of L.1500; house in Hamilton Place, with furniture and wine, say L.22,000; household furniture and wine at Coilsfield, say L.8000; family plate, ditto, L.8000; the crop, stocking, &c. on the lands which were in Lord Montgomerie's own possession, L.2000; the stud, L.1000; furniture at Skelmorlie, L.300; lands of Park, L.8000;—total, L.50,000. But of this fund, Lady Montgomerie will have to retain furniture at Coilsfield, L.8000; family plate, L.8000; ‘retaining these two subjects, which are estimated at the value of L.16,000, ‘that being deducted from the L.50,000, left a balance of L.34,000; ‘this, therefore, leaves a ‘deficiency of L.66,000 sterling to pay the ‘balance of the debt, to provide for which the following lands can be ‘sold to Lord Eglinton, as they lie intermixed with his estate.’ Then certain lands are enumerated, which are proposed to be sold to Lord Eglinton, and which, it is estimated, will be sold for L.22,820. Then comes this statement,—‘As Lady Montgomerie has resolved to restrict her expenditure to L.5000 a-year, and to allow the remainder ‘of the free rents of her estate to be applied towards the extinction ‘of the balance of the debt, it is calculated that the debts may in ‘this way be all discharged in the course of five years, including the ‘expenses necessary for carrying the arrangement into execution. As ‘the lands proposed to be sold to Lord Eglinton are, with the other ‘fee-simple lands belonging to Lady Montgomerie, charged with ‘L.20,000 sterling;’ it then goes on to state, that a sale could not, with any prospect of advantage, be made to any other person but his Lordship; but that has no bearing upon any part of the instrument upon which this question arises. Then follows this statement:— ‘Lady Montgomerie having fully considered the particulars before ‘stated, approves of and agrees to the arrangement suggested, and ‘has accordingly executed a commission in favour of Lord Alloway,

‘ Mr George Russell, and Mr Samuel Anderson, for carrying the same April 15. 1825.
‘ into execution, as well as for the general management of her affairs.’

Now, before I proceed to the instrument, which was executed on the same day, upon which most material observations arise, I would call your Lordships’ attention for a moment to this. It is contended, on the one hand, that this statement, that the debts might be all discharged in the course of five years, was intended by Lady Montgomerie to limit the period during which the surplus rents were to be applied to those five years; although she had previously stated, that her object was to discharge the debts altogether, certainly in that part of the instrument, without any regard to the period at which they should be discharged. Here she states, that ‘ it is calculated that the ‘ debts may in this way be all discharged in the course of five years :’ not saying there, that five years was to be the ultimate limitation, but that it was calculated that the debts might be all discharged in that way in the course of five years. Now, as I have stated to your Lordships, this was not only submitted to Lady Montgomerie, the person undoubtedly, in the first instance, to regulate the terms, but was afterwards submitted to the creditors, as will appear by the recital in a subsequent instrument.

My Lords,—On the same day Lady Montgomerie executed a commission, and by that commission she nominated my Lord Alloway, Mr George Russell, and Mr Samuel Anderson, managers of her estate; and in the first part of the instrument she gave them the most extensive powers to carry on this trust—powers to receive rents, powers to grant receipts and acquittances, and powers to bring ejectments and grant leases. Then it goes on in these words :—(His Lordship then read the deed. See ante, p. 118.)

Now, my Lords, it strikes me at the first perusal of this instrument to be rather remarkable, that if my Lady Montgomerie’s intention was only to appropriate the surplus rents for five years, the delegation to the commissioners did not extend only to five years,—I mean as far as the payment of debts was concerned. It is true she appointed them general managers; but it is stated by her, that the commission to them shall continue as long as the object continued unanswered, namely, the extinction of the debts: she says, I will have the power of recalling it whenever I please. I say, if that was intended as a matter of limitation, and not merely as a calculation that the debts would be paid within that time, it is remarkable that she does not expressly restrict the duration of it, as to the payment of the surplus rents and profits, to the five years to which it is said she intended to confine the application of it. It is true she says they are to apply the rents, ‘ with the exception of what may be required for defraying the ‘ expenses of my own establishment, towards the gradual payment and ‘ extinction of the aforesaid debts, all as mentioned and contained, so ‘ far as the circumstances are at present known, in a statement and ‘ minute subscribed by me of this date, and bearing reference hereto.’

April 15. 1895. Undoubtedly she refers to the statement and minute as containing the calculation of the property and the general object by which she intended to be bound; but if it was intended by her to consider the period within which the payment of the debts was expected to be made as a limitation of the liability to supply the surplus rents, it is remarkable that this commission does not contain a limitation to that effect.

But, my Lords, let us see what subsequently took place. In the month of October 1814, in consequence of the application to the creditors, she executed an obligation and assignation, to which I will call your Lordships' attention. It is in these words:—(His Lordship then read the deed. See ante, p. 114.)

My Lords,—There is no limitation introduced here as to the period for which the commissioners were to hold these lands, except the period of the extinction of the debts contracted by Lord Montgomerie. This obligation is stated to be in implement of the minute and statement; and if it be so, then it shews that the intention of the parties was not to restrict the commissioners to the period of five years, but that her object was to extinguish those debts in toto, and that until those debts were extinguished she was willing to restrict herself to L. 5000 a-year. Upon the instrument itself, therefore, it appears to me there is no doubt of the intention of the parties.

My Lords,—Throwing out of consideration the letters written by this lady herself and her agent, which have been pressed at your Lordships' Bar, the effect and purport of which letters was, that the debts would be ultimately paid, though in consequence of the depression of rents the period of payment would be farther removed, there is another important document, clearly manifesting what was the intention of the parties, and what they thought they had done,—I mean the statement and proposal submitted to the creditors in 1817. In 1817 it was found, that by the diminution of rents it would be a long period before the surplus rents would enable these commissioners to liquidate the debts; a proposal was therefore made to the creditors, the language of which is not unimportant for your Lordships' consideration. It states, 'By the arrangement made by Lady Montgomerie in summer 1814, regarding the debts of the late Lord Montgomerie, which were estimated to amount to about L. 99,000, it was proposed that they should be paid off from the following sources;' and then it states the sources, as stated in the minute, amounting to L. 50,800. 'But of this fund Lady Montgomerie would have to retain 'furniture at Coilsfield, which was then estimated at L. 6000, (it had before been taken at L. 8000), family plate L. 8000, making together 'L. 14,000, being the sum of L. 36,800 to be applied to the payment 'of the debts.' And thus there appeared to be a deficiency of funds to the extent of L. 63,000, which her Ladyship proposed to make up by a sale of part of her fee-simple estate to Lord Eglinton, which it was calculated might produce L. 22,820. But as the property was

April 15. 1824.

charged with certain encumbrances, which could not be easily removed, it was necessary, in order to induce Lord Eglinton to make the purchase, that the payment of the price should be made convenient for him. 'What part of the debt—I beg your Lordships' attention to this statement—'What part of the debt should remain after the application of this, was proposed to be paid off gradually from the surplus rents of her Ladyship's estates, after setting aside L. 5000 a-year for herself. Lady Montgomerie granted a commission to Lord Alloway, Mr Russell, and Mr Anderson, for carrying the arrangement into execution, and likewise granted a factory to Mr Haldane for managing the estate and uplifting the rents. The personal effects of Lord Montgomerie, before noticed, were accordingly sold off and converted into money, (except the household furniture at Coilafield, and plate), and the produce applied in part payment of Government taxes and privileged debts. The house in Hamilton-place and furniture were likewise sold for L. 22,500; but owing to its being under a lease for two years the bargain was broken off, and it has since been sold at the reduced price of L. 19,000, and the necessary steps are now taking for completing the sale. The lands proposed to be sold to Lord Eglinton were purchased by his Lordship, but fell short of the estimated price by about L. 2000; and owing to the encumbrances which have been mentioned, his Lordship has only paid L. 4000 to account of the price. With regard to the rents of Lady Montgomerie's estate, they have been very unproductive, owing to the general distress of the tenantry in Scotland; and all the surplus rents that the factor has been able to collect have been little more than sufficient to answer public burdens and preferable debts. From these causes, therefore, the original estimated amount of Lord Montgomerie's debts has not suffered a reduction to a greater extent than about L. 21,000. If, therefore, matters are to go on in this way, there is no calculating when the creditors may receive payment.' 'Why, my Lords, if the intention of these parties had been that the period of five years should be the whole period during which this trust was to continue, would it not have been said, We are now in the year 1817; there are only about two or three years during which these rents will be received; the whole amount received, therefore, will be quite insufficient to pay you your debts, and after that period Lady Montgomerie is totally discharged from the payment of them? But no such thing. Then they go on to say, that she is inclined to sell certain property valued at L. 30,985. 9s. 9d., which had not been intended to be appropriated by her to the payment of the debts; and thus it is held out to the creditors, that if they will accept that, they will be very nearly paid in full, and they will not have to wait for the payment of their debts till the rents can make up the deficiency, but they can at once by this arrangement receive the payment of their debts, if not altogether in full, with a very slight deficiency; and that therefore it is much more for their interest to be paid thus, than to wait for the pay-

April 15. 1826. ment of their debts till an indefinite period when they may expect to receive payment. My Lords, according to the restriction which Lady Montgomerie now puts upon this instrument, this was a most advantageous arrangement for the creditors, for this was giving them infinitely more than they could receive within the five years. The creditors, however, refused this proposition, in consequence of which ultimately this proceeding has been instituted.

My Lords,—I must confess that, hard as this case may appear to be upon Lady Montgomerie, and hard it undoubtedly is, because, as I have already stated, this was an obligation under which she was under no legal liability to come, but was dictated by feelings which I have more than once stated to be so honourable to her, it appears to me, and it was so argued at the Bar, that the only question for your Lordships' consideration is, What is the fair construction of the whole of these instruments taken together, and what was the liability under which Lady Montgomerie came? My Lords, I observe that those very learned persons, for whose opinions we must entertain the highest respect, the Lord President and Lord Gillies, as well as Lord Hermand, seem to argue, that because, after these instruments were executed, this depression took place, which had not been in the minds of the parties, that is a circumstance which entitles her to be relieved from this contract. My Lords, I must beg leave to differ from those learned persons in that view of the subject. There is no doubt she conceived that, the amount of the rents being that which is stated, it was most probable her whole estates would produce for the next five or six years the same as they had produced; and therefore she should, at the expiration of that period, be relieved from the burden she had imposed upon her estate, and the creditors all be paid. But, my Lords, how can it be contended, that because there has been that depression in the value of property, she is therefore released from her contract? It was impossible at that time to foresee whether the value would be depressed or increased. If the rents had been increased, the creditors of course would have received payment sooner, and she would have been at an earlier period relieved from the burden. But the question is, what was the contract Lady Montgomerie entered into? Was it not, that the surplus rent should be appropriated to the debts till they were extinguished; and was this reference to the period in the statement and minute intended as a limitation of that trust? I think, my Lords, on looking at the words themselves, it is impossible to contend that it was a limitation. It appears to me that it was only the expression of an idea on her part, and that of the creditors, as to the period within which they might probably expect payment. It is not said they will be paid before that time, but that they may be paid before that time. The construction now contended for is, that even if the rents had remained as they were, and if they and the other property had not produced the sum at which they had been calculated, the moment of the expiration of the five years there was an end of the

power of the trustees to apply one farthing to the payment of the debts. My Lords, having looked at this case most anxiously, because it is certainly not to be concealed that it is a case of hardship on the part of Lady Montgomerie, it is plain that the single question is, what is the contract between the parties? In judging of this your Lordships must confine yourselves to the instruments; you cannot go out of the instruments themselves, and cannot be influenced by any circumstances of hardship operating on the one party or on the other, in consequence of the contract they have entered into. My Lords, upon the whole, after the most deliberate consideration, I cannot bring myself to coincide with the opinion of the Court of Session. I am of opinion that the true construction of this instrument is, that the surplus rents were to be applied till the debts were extinguished. I am of opinion, therefore, that that part of the interlocutor which is complained of should be reversed; and I shall therefore—not at this moment, for it will require some little attention as to the manner in which your Lordships' judgment shall be drawn, because, in this view of the subject, the case must go back to the Court of Session; but I shall certainly propose to your Lordships, the next time I have the honour to attend your Lordships, a minute of the judgment, the effect of which will be to alter that part of the interlocutor of the Lord Ordinary, and the subsequent interlocutor of the Court of Session, as to the construction of the instrument. Of course, the case must then be remitted to the Court of Session, to apply your Lordships' judgment to the circumstances of the case.

April 15. 1825.

Appellants' Authorities.—3. *Eryk.* 3. 89.; Hog, Nov. 30. 1749, (1390.); 1. *Bankton*, 9. 8.; 14. *Vesey*, 273.

Respondents' Authorities.—3. *Eryk.* 3. 87. and 92.; French, Feb. 18. 1669, (6366); Duke of Lauderdale, Dec. 14. 1684, (6379.)

J. CAMPBELL—A. MUNDELL,—Solicitors.

ALEXANDER COOPER, of Failford, Appellant.

No. 15.

MARGARET CAMPBELL, and Others, Children of the late JAMES CAMPBELL, and ALEXANDER HAMILTON, Writer in Mauchline, Respondents.

Reparation—Damages.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a party was not entitled to damages for the alleged illegal execution of diligence.

THE late James Campbell, the father of the respondents, was a tenant on the estate of Failford, in the county of Ayr, belonging to the appellant Cooper. In 1793 Cooper raised an action

April 18. 1825.

2d DIVISION.
Lord Cringletie.

April 18. 1825. before the Sheriff against Campbell, for alleged violations of his lease; from which the Sheriff assoilzied him; and the Court of Session adhered, and found Cooper liable in L.79 of expenses. Against this judgment Cooper entered his appeal to the House of Lords; but he afterwards withdrew it, in consequence of the parties having agreed to submit the decision to Mr Professor Davidson of Glasgow, and Mr Reddie, assessor and town-clerk of that city. In the meanwhile Campbell had died, and the submission was entered into with his widow and children, without any objection being made to their title. After a long litigation, the arbiters, on the 1st November 1818, issued notes, finding Cooper liable in L.107. 11s. 3d. with interest from that date.

Previous to the death of Campbell, and during the dependance of the above action, Cooper raised another against him, for the statutory penalties of destroying trees upon his property; and upon the 27th May 1803 he obtained a decree from Lord Woodhouselee for L.10 of damages; to which sum his Lordship was induced to modify them, in respect that the injury had been done 'by children far under the age of pupillarity, and ignorant of the mischief they were doing.' No proceedings were adopted under this decree, which remained unextracted, nor was it founded upon before the arbiters.

On the 12th January 1819, the agent of Cooper addressed this letter to Mr Hamilton, writer in Mauchline, who acted as the country agent of the Campbells:—'As agent for Alexander Cooper of Failford, Esquire, I am ready to pay the sums decerned for by the arbiters, as in the submission betwixt Mr Cooper and the representatives of the late James Campbell, on Mr Cooper being allowed deduction of the sum of L.10 sterling, contained in decret obtained by Mr Cooper against Campbell before the Court of Session, dated 27th May 1803; also of the sum of L.2. 10s. 4d., being half of expense of drawing and extending said submission, with the legal interest due on these sums. It will be necessary for Campbell's representatives to expedite confirmation of the sums decerned for, before they can grant a valid discharge to Mr Cooper: therefore, as Mr Cooper is willing to pay the sums decerned for, under the above deductions, on such discharge being granted, he will hold Campbell's representatives as liable to him for any further expenses that may be incurred in the submission after the date of this intimation.' At this time Hamilton had gone to London, and his clerk returned an answer on the 18th, stating, that the sum decerned for was L.107. 11s. 3d.; that he had no doubt that in

April 18. 1825.

that sum was included the expenses of drawing and extending the submission, but as to which he would make inquiries: 'With respect, however, to the L. 10, said to have been contained in a decret of the Court of Session so long ago as the 22d May 1803, I have no doubt that it was paid long ago; but as the sum is not considerable, I shall advise my clients to allow it, provided Mr Cooper will take his oath in presence of a Magistrate here, and give Mr Hamilton or me three days' notice that we may attend his examination, that the foressaid sum of L. 10 was not paid to him or his agents. You say it will be necessary for Campbell's representatives to expedite a confirmation before they can grant a valid discharge to Mr Cooper for the money. But in this I apprehend you will find yourself mistaken. Their title is ascertained and acknowledged by the submission. The arbiters have decided the sums found due to be paid to them; and in virtue of this decret I will find no difficulty whatever in obliging Mr Cooper to pay the money, for which they will of course give a discharge.' No notice was taken of this letter; and, on the 20th, Hamilton's clerk again wrote to the agent of Cooper, informing him that he had ascertained that credit had been given to Cooper by the arbiters for one-half of the expense of drawing the submission; that there was no necessity for a confirmation; that the Campbells were not liable for interest on the L. 10, as they had never been denounced on a horning; that they were ready to give credit for the L. 10, on the conditions formerly mentioned; and that if the matter were not settled within eight days, he would have recourse to diligence. On the following day, being the 21st, the decree-arbitral was signed; and still no notice being taken of the above letters by Cooper or his agents, Hamilton's clerk again wrote on the 4th February, requiring an explicit answer. No answer, however, was sent, and Hamilton having returned from London, addressed the following letter on the 26th February to Cooper's agent:—'I have seen your letter of the 12th ultimo (January), intimating, as agent for Alexander Cooper of Failford, Esquire, that you are ready to pay the sums decerned for by the arbiters in the submission between the late James Campbell's representatives and Mr Cooper, under deduction of L. 10, said to be contained in a decret at Mr Cooper's instance against James Campbell, 27th May 1803, and the sum of L. 2. 10s. 4d., being the half expense for drawing the submission, with the legal interest due on these sums. You will observe, that the arbiters have decerned for the total sum of L. 107. 11s. 3d., after deducting the

April 18. 1826. ' half expense of drawing the submission, and every other claim
 ' of deduction which Mr Cooper could make in the submission,
 ' with interest since the 1st of November till the sums are paid.
 ' With regard to the sum of L.10 now claimed by Mr Cooper,
 ' and which, in the whole course of all the vexatious pleadings in
 ' this hard case, was never before heard of, I am satisfied that this
 ' sum has already been paid to Mr Cooper or his agent; but as
 ' I still want a little more information upon the point, which I
 ' may not recover for some time, I will allow Mr Cooper the sum in
 ' the mean time; and should I ultimately be right in what I allege,
 ' I shall prosecute him for repayment. I will, however, positively
 ' refuse any demand of interest upon this sum. My clients can-
 ' not be liable for this until they have been regularly denounced
 ' on a horning, which has never been done against them or their
 ' late father. I may add, that as I am now ready to give credit
 ' for the sum, without interest, under the above reservation; that
 ' I shall hold Mr Cooper responsible for any expense that may
 ' be incurred in attempting to recover this debt after this offer.
 ' I suppose you have discovered that it will not be necessary for
 ' my clients to confirm. Under all these circumstances, I must
 ' insist that the account below noted be paid to me on or before
 ' the 3d of March, or Mr Cooper may blame himself for the after
 ' steps for recovering the sums, and the consequent expense.

' Amount contained in the decret of Messrs Da-
 ' vidson and Reddie,

L. 107 11 3

' Interest thereon from 1st November 1818 to 1st

' March 1819,

1 15 10

L. 109 7 1'

To this letter no written reply was made, but it was stated by Cooper, that his agent had verbally informed Hamilton that he did not mean to insist on confirmation, but that he did not depart from his claim for interest on the L.10. About fourteen days thereafter, letters of horning were raised upon the decree-arbitral, which were put into the hands of a messenger on the 13th of March, to charge Cooper, along with a letter from Hamilton, in which he informed Cooper, that as he had learned from his agent that his letter had been delivered to him, he begged to refer to it; and stated, that he was ready to adhere to the terms there mentioned, and therefore, if he thought fit to suspend the charge, he must do so at his own peril. On the

April 18. 1825.

17th, Cooper presented a bill of suspension, which Lord Hermand on the same day refused, without answers, except as to the L.10, and interest thereof, as to which he ordered answers and sisted execution. A second bill was presented on the following day, in which Cooper contended, that the respondents were bound to confirm. This bill Lord Cringletie appointed to be answered, observing at the same time, 'that the sum decreed for 'is part of the funds that belonged to the father of the chargers,' and inquiring whether it had 'been given up in the inventory 'of his personal estate to the Commissary Court of the district 'where he died.' On the 19th, the agent of Cooper offered payment to Hamilton of L.92. 2s., being the sum decreed for, under deduction of the L.10, and interest, 'provided you deliver me a full and complete discharge in favour of Mr Cooper, 'which will relieve him of all after charges;' and stating, that he would be ready to pay the money at any time on such a discharge being produced; but he did not explain that he did not intend to insist on confirmation; nor did he withdraw his suspension, which was rested mainly on that ground. On advising the bill with answers, Lord Succoth, on the 29th, refused it, except as to the L.10, and interest, 'in respect that confirmation appears not to be necessary in this case, the sum charged for, being that decreed for by the decret-arbitral between 'the parties, never having belonged to the deceased James 'Campbell.' A prorogation was granted till the 8th of April, being the box-day, to enable Cooper to reclaim to the Court; but no petition being lodged, the respondents, on the 10th of April, obtained a certificate of refusal, and on the 11th and 12th they executed arrestments in the hands of Cooper's tenants. On the 17th a petition against Lord Succoth's judgment was lodged, and on the 19th the respondent caused Cooper to be denounced, and letters of caption to be raised. But at this time nothing farther was done. The petition was refused by the Court on the 18th May, without hearing the Counsel for the respondents, who intended to have objected to its competency. Four days previously, Cooper had loosed the arrestments by consignation in the Bill Chamber, and he alleged, that of this the respondents were aware. The debt not having been paid, the letters of caption were transmitted to Hamilton, who put them into the hands of a messenger, on the 21st, to execute them. Accordingly, some time between seven and nine o'clock of the evening of that day, the messenger went to Cooper's house, situated near Matchline, and apprehended him. Instead

April 18. 1825. of carrying him off as a prisoner, the messenger indulged Cooper with time in order to send to Ayr, about eleven miles distant, for his agent. In the course of the night his agent arrived, and by his advice Cooper gave a draft upon his banker for the sum contained in the diligence, but under protest; and he refused to take a receipt, or to do any thing to indicate that he had paid the debt voluntarily.

In the month of September thereafter, he raised an action of damages against the Campbells, and also against their agent Hamilton, which, after setting forth that he was an extensive landed proprietor, a Justice of the Peace, a freeholder, and deputy-lieutenant; that he had long been in bad health, of which the respondents were fully aware, and narrating the proceedings which had occurred; he alleged, that the diligence had been executed against him, 'not for the necessary purpose of recovering payment of the sum due by the pursuer, but in order to harass and oppress him; to insult his feelings, and to degrade him in the estimation of the class of society to which he belongs; and that all the oppressive and illegal proceedings took place in consequence of instructions given by the said Alexander Hamilton.' There was, however, no allegation in the summons that Hamilton was influenced by malicious motives against Cooper. In defence the respondents admitted, that they had executed the diligence under the circumstances above mentioned; denied that they had been actuated by any other motive than that of recovering payment of a debt which had been due for a long period of time; stated, that they had given every reasonable indulgence to Cooper, and that they were entitled in law to do that which they had done. The Lord Ordinary appointed Cooper to lodge a condescendence, and at the same time issued the following note:—'The Lord Ordinary has attentively considered this cause, and thus expresses his ideas, that the pursuer may consider well before he goes farther. The grounds for damages seem to be,—1st, That arrestments were used in the hands of his tenants for more than the debt due by the pursuer to the arresters; that such arrestments were wanton and rimious, because he had found ample caution in the suspension; that he loosed the arrestments on consignment, which was full security to the arresters. And, 2dly, That notwithstanding this, they illegally obtained letters of caption, which they executed against the pursuer. Now, the Lord Ordinary desires the pursuer to advert, that caution in the Bill-Chamber is conditional, only depending on the bill being passed; and, of course, if the bill be

April 18. 1895.

' refused, the caution is null: The pursuer's bills of suspension
 ' were both refused by Lords Hermand and Succoth, and a cer-
 ' tificate of refusal was issued from the Bill-Chamber on the 10th
 ' of April, two days after the box-day, when no petition was pre-
 ' sented for the pursuer, and two days after the sist by Lord Suc-
 ' coth had expired. Arrestments were thereon used, and lawfully
 ' used for security, since the caution was at an end; and as for
 ' their exceeding the amount of the debt, that is a matter of style
 ' and common practice, although, like other customs, more
 ' honoured in the breach than the observance. A certain excess
 ' above the debt is, however, necessary to cover expenses of a
 ' forthcoming, &c. Caption, too, was legally taken out, after
 ' the certificate of refusal, and subsequent arrestments; it being
 ' quite clear that the application for suspension was at an end.
 ' If the loosing of the arrestments on consignation was intimated
 ' to the respondents before they used their caption, the Lord Ordi-
 ' nary thinks the conduct of the respondents was reprehensible,
 ' since they had immediate access to the money, and might have
 ' got it, by desiring the pursuer's consent to uplift it. If the pur-
 ' suer refused that consent, the execution of the caption was rea-
 ' sonable and fair. On the other hand, if the loosing of the arrest-
 ' ments on consignation was not intimated to the respondents, and
 ' the pursuer does not say that it was till the night when the cap-
 ' tion was executed, the Lord Ordinary thinks that measure was
 ' both warranted and legal, since the respondents were not bound
 ' to know that their arrestments had been loosed, and were not
 ' obliged to wait the event of a forthcoming for recovery of their
 ' money.' On the 24th of May his Lordship ordained Cooper ' to
 ' revise his condescendence, and state pointedly whether he offers
 ' to prove that he intimated, or caused to be intimated to the res-
 ' pondents, the fact that he had loosed their arrestments on con-
 ' signation, and to produce the evidence thereof, if the same be in
 ' writing.' Thereafter, on considering the revised condescendence,
 ' his Lordship assoilzied the defenders, and found them entitled to
 ' expenses, ' in respect that the pursuer has not offered to prove,
 ' which he was called on to do by the interlocutor of Court dated
 ' 24th May last, and in respect of the reasons given in a note
 ' prefixed to that interlocutor.' And he refused a representation,
 ' in respect of the reasons contained in a note prefixed to the in-
 ' terlocutor of 24th May last, and also that the offer of L. 92. 2s.
 ' was minus the sum the defenders were entitled to demand by
 ' no less than L. 17; and that offer was only made, provided " you
 ' deliver me a full and complete discharge," which was compelling

April 18. 1836.

‘the defenders to give up L. 17, to which they have been found entitled.’ ‘The representor complains grievously of the conduct of the defenders to him, but he should take a retrospect of his own to them, and he will see that he has been not a little litigious.’ The L. 17 here alluded to consisted of the L. 10, with interest, as to which Cooper subsequently got the letters suspended simpliciter. He then reclaimed, but the Court, on advising his petition with answers, on the 4th June 1832, adhered; and again, on considering another petition with answers, their Lordships, on the 23d May 1838, adhered.*

Cooper appealed.

Appellant.—The proceedings subsequent to March 1819 were illegal, because on that day the appellant tendered the whole sum which it has been found he was compellable to pay. It is not true that the offer was qualified with the condition that the Campbells should confirm; and the appellant was ready to establish that there was no such condition. Besides, as the petition operated as a writ of execution, it was illegal to denounce the appellant as a rebel; and raise letters of caption against him, while it was undisposed of. He had also consigned the full amount of the debt in consequence of the arrestments before the petition was refused; a fact of which he offered to prove the respondents were aware, and yet nevertheless they apprehended him upon a caption, and compelled him to pay the money a second time. The whole of the proceedings were resorted to for the purpose of harassing and oppressing the appellant, who was then known to be in bad health.

Respondents.—So far as the respondents Campbells are concerned, the appellant has not stated a relevant case, because he has not shewn that they have done any thing which was inconsistent with the law; and so far as the respondent Hamilton was concerned, he acted as their agent; and therefore, unless the appellant could shew, not only that the proceedings were illegal, but that Hamilton acted under the influence of malice, he could not obtain damages from him. But in the summons there was no allegation of malice; and therefore the only question was, whether the proceedings were illegal, and which question could refer only to the liability of the Campbells. Instead of having done any thing illegal, the respondents had given the appellant more indulgence than he was lawfully entitled to.

* See 2. Shaw and Dunlop, No. 316.

They had a valid decree against him for a sum of money, which he refused to pay, unless the respondents expedite a confirmation, which they were not bound to do. No diligence was raised on that decree for several weeks after it was issued; and the judgment of Lord Hermand, sisting execution as to the £.10 and interest, gave the appellant every thing he was lawfully entitled to demand. Nevertheless he still insisted that the respondents were bound to confirm; and while he was maintaining this plea, he made the offer of the 19th March, requiring a complete and valid discharge, which could only mean that for which he was contending in Court. He did not renew his offer after Lord Succoth had found that he had no right to require confirmation, but, on the contrary, reclaimed to the Court upon that point. His petition was incompetent, because a certificate of refusal had been issued and execution done by arresting, and therefore the respondents were entitled to raise letters of caption. They were not, however, executed till three days after the petition was finally refused; and, while no obstacle whatever to execution existed, the losing of the arrestments and consignation could not prevent the respondents from executing the caption, even although they had been aware of it; because they could not get up the money without the appellant's consent, and this they could not obtain except by the compulsion of the law. Every indulgence was given to him when he was apprehended; and if their proceedings were legal, it is not relevant to say that he was either a rich man or in bad health.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, 'with £.100 costs.'

LORD CHANCELLOR.—My Lords, There is another case which stands for your Lordships' judgment to-day, which is the cause which was last heard at your Lordships' Bar,—the cause in which Alexander Cooper is the appellant, and Margaret Campbell, and others, are respondents. Your Lordships were pleased to indulge me, after the close of the argument at the Bar, with a short time for the purpose of looking into the several cases.

My Lords,—Where it is the intention of the individual moving your Lordships to propose that the judgment shall be reversed, it is proper that he should state fully the grounds of the opinion he has formed; but where it is his intention to recommend to your Lordships an affirmance of the judgment, it is not the custom to give his reasons very much at large. It is sufficient for me on the present occasion to say, that when the question is put that this judgment be reversed, I

April 18. 1825. shall feel it my duty to vote for its being affirmed; and when one looks at the nature of the case, I think we certainly cannot affirm it without giving the costs occasioned by the respondents having been brought here, I would therefore move your Lordships that this judgment be affirmed, with L.100 costs.

Appellant's Authorities.—A. S. June 14. 1799; Taylor, Dec. 1820; A. S. Nov. 9. 1599.

J. CHALMER,—Solicitor.

No. 16.

JAMES WEMYSS, Appellant.

HUGH HAY, Esq. of Morton, Respondent.

Writ—Testing Clause—1681, c. 5.—Held, (affirming the judgment of the Court of Session), That a testing clause, naming and designing certain persons who signed as witnesses, but not expressly stating that they were witnesses to the subscription of the grantor, was effectual.

April 19. 1825.

2d DIVISION.
Lord Pitmilley.

THE late John Hay, Esq. of Morton, in the county of Fife, executed a deed of entail, by which he conveyed his estate to his nephew, John Hay, whom failing, a series of substitutes. The entailor died in 1775, and was succeeded by his nephew, who made up titles in virtue of the entail, and possessed the estate till his death in 1799. The respondent, Hugh Hay, was his son and heir, and thenceforth enjoyed possession, without interruption, as his heir-apparent, till 1815. On the 26th of May of that year the appellant, James Wemyss, the grand-nephew and heir-at-law of the entailor, brought an action of reduction of the entail, in respect of the testing clause being defective, and that the deed had been executed on deathbed; but this latter question did not enter into the present discussion. The testing clause was thus expressed:—‘In witness whereof (written on this and ‘the eleven preceding pages of stamp paper by David Fraser, ‘writer in St. Andrews). I have subscribed these presents, consisting of this and the said eleven preceding pages, and marginal ‘note on the fourth page, and to the deleting of part of a word ‘in the ninth line, and another part of the said word in the tenth ‘line of the fifth page, counting from the bottom, before signing; ‘John Bower, son to Patrick Bower, bookseller in St Andrews, ‘and the said Patrick Bower and David Fraser. (Signed) JOHN ‘HAY. John Bower, witness, Patrick Bower, witness, David ‘Fraser, witness.’ The defects in this clause which were mainly relied on were, 1st, That neither the place nor date of the grantor’s

April 19, 1826.

subscription were inserted; and, 2dly, That it was not stated that the persons who signed the deed as witnesses were those in whose presence it was executed. The Lord Ordinary pronounced this interlocutor:—‘The Lord Ordinary having heard parties’ procurators, and considered the process and productions, repels the reasons of reduction in so far as they are founded on the omission in the testing clause of the deed of entail to mention the place and date of the granter’s subscription; also repels the reasons of reduction founded on the fact that the persons who sign the said deed as witnesses are not designated as witnesses, nor said to be such in the testing clause, in respect the designations of these persons is given in the testing clause, and that each of them adjoins the word “witness” to his subscription. In so far, therefore, as concerns the objections to the deed as not duly tested, and as defective in the legal solemnities, sustains the defences, assoilzies the defender, and decerns; but with respect to the reason of reduction founded on an allegation that the deed was executed on deathbed, in respect that the date of the subscription does not appear from the testing clause, ordains the defender, before answer, to give in a condescendence, in terms of the Act of Sederunt, stating in what manner he offers to prove, 1st, The date of the deed under reduction; and, 2dly, The date of the granter’s death, and what his averments are on both these points.’ Against this judgment (except in so far as it related to the question of deathbed) the appellant reclaimed, and, on advising his petition with the answers, the Court, on the 27th June 1816, adhered. The appellant then presented another petition, on advising which, with answers, the Court appointed the cause to be heard in presence of the whole Judges; and thereafter the Lords President, Hermand, Balmuto, Succoth, Balgray, Gillies, Pitmilley, Alloway, and Cringletie, transmitted to the Second Division this opinion:—‘The above Judges are unanimously of opinion, that in the testing clause in question, the requisites of the Act 1681, cap. 5. have been sufficiently complied with, for the reasons stated in Lord Pitmilley’s interlocutor.’ At this time it was not requisite that judgment should proceed according to the majority of the consulted Judges; and, when the case came on for advising, there being three Judges of the Second Division who considered the clause defective, and two in favour of it, their Lordships, on the 12th November 1819, altered, sustained the reasons of reduction, and decerned in terms of the libel, but found no expenses due. The respondent then reclaimed, and the Court, on the 31st January 1821, altered,

April 19. 1825. and returned to their interlocutor adhering to that of the Lord Ordinary; and to this judgment they adhered on the 5th June 1821, by refusing a petition without answers.*

Wemyss appealed.

Appellant.—By the statute 1691, ch. 5. it is declared, ‘that all such writs, to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not sup-
pliable by condescending upon the writer, or the designation of the writer and witnesses.’ But the deed in question does not, even with the aid of the names subscribed, shew with certainty who the subscribing witnesses truly were, and therefore the deed is null and void. But, further, it is declared by the above statute, ‘that in all the said cases the witnesses be designed in the body of the writ, instrument, or execution respective, otherwise the same shall be null and void, and make no faith in judgment, nor outwith.’ In the body of the writing, however, of the present deed, no mention is made of witnesses at all, and consequently, on this separate ground, the deed is also null and void.

Respondents.—It is not denied that the signature of the granter is genuine, nor that those which are adhibited with the word ‘witness’ annexed to them are truly the subscriptions of the persons mentioned in the body of the writ. But there is no law which provides that the testing clause of a deed shall be in any one form rather than in another; and therefore the question comes to be, Whether the statutory requisites have been complied with? If they have been so in substance, this is all that is necessary; and it will not be disputed, that if the mere preposition ‘before’ had been inserted, the deed would have been unobjectionable. The statute does not require that the party shall sign in presence of the witnesses. It is sufficient if he acknowledge his signature to them; and therefore it is not necessary to say that the deed was executed in presence of witnesses. All that is required is, that the witnesses should be named and designed in the body of the writ. But the clause begins with the attestation, ‘In witness whereof I have subscribed these presents;’ and as the whole clause, including the names adhibited to it, must be taken into view, and as each of the persons who subscribe state that he was ‘witness,’ it necessarily follows, that these persons (who are mentioned in the body of the writ) were

* See 1. Shaw and Ballantine, No. 56.

the witnesses to the subscription attested by the grantor to have been made. Accordingly, this point was so decided in express terms in the case of Doig against Kerr.*

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed; and it is further ordered, that the cause be remitted back to the Court of Session to proceed therein upon the points not decided by the interlocutors hereby affirmed, as shall be just.'

Appellants' Authorities.—1681, c. 5.; 1540, c. 17.; 3. Ersk. 2. 11.; Bell on Testing Deeds, p. 45.; 1. Jur. Styles, 13. and 34.; 1. Bankton, p. 333.; 1. Ross, 142.; Graham, Dec. 26. 1762, (16,802.); Archibalds, Nov. 17. 1769, (16,907.); Douglas, Hume and Company, Nov. 28. 1767, (16,908.)

Respondent's Authorities.—Duke of Douglas, Jan. 6. 1747, (Kilk. p. 610.); 1579, c. 60.; 2. Ersk. 2. 11.; 1493, c. 175.; 1681, c. 5.; Droman, July 26. 1716, (16,866.); Ewing, July 20. 1739, (1352.); Gossy, July 5. 1710, (16,892.); Durie, March 9. 1753, (16,934.); Doig, Jan. 9. 1741, (16,900.); Clarke, July 17. 1752, (3806.); Paterson, Jan. 16. 1784, (3807.)

J. RICHARDSON—J. CHALMER,—Solicitors.

DAVID MORRISON and Others, (TURNBULL'S Trustees),
Appellants.

No. 17.

WILLIAM ROBERTSON, Respondent.

Submission.—Circumstances under which (affirming the judgment of the Court of Session) a decree arbitral, alleged to be ultra vires, and containing an error calculi, was sustained.

GEORGE TURNBULL, merchant in Perth, and William Robertson, merchant in Blair-Gowrie, entered into a joint adventure

April 26. 1825.

2D DIVISION.
Lord Cringletie.

* It is stated by the respondent, that recently before the death of the grantor he consulted Mr M'Queen, afterwards Lord Braxfield, as to whether the clause was objectionable, and that he received an opinion recommending a new deed as a prudent measure; but 'as to the second objection, which is an objection to the "testing clause," in as far as it wants the words, "before these witnesses," I do not think that the objection is relevant to annul the deed, because, as is very properly observed in the memorial, the enactment of the statute 1681 is literally complied with. The instrumental witnesses do, in reality, subscribe the deed, and subscribe themselves as witnesses, and those who subscribe as witnesses are likewise named and designed in the deed itself, which is all that is required by the foresaid statute.' He also stated, that a similar opinion had been given by Mr Campbell, afterwards Lord President; and that the entail was only prevented, by being then on deathbed, to execute a new deed; and that although Lord Robertson was at first against the validity of the clause, he afterwards was satisfied that it was unobjectionable.

April 26. 1825. for the purchase and sale of three parcels of linen. In order to pay the price, amounting to L.1840. 3s. 9d., Robertson drew bills upon Turnbull, who accepted them, and they were then indorsed by Robertson to the sellers, or discounted with banks, and the proceeds applied in extinction of the price. In bleaching the linen, an expense was incurred of L. 328. 2s. 4d., making the total price or value of the goods L. 2168. 2s. 1d. Two of the parcels after being bleached were delivered to Turnbull, the one of which he sold for L. 880. 10s. 4d., out of which he paid bills to the amount of L. 729. 13s. 4d., leaving a balance in his hands of L.150. 17s. 0½d. The other he sold for L. 301, for which he received and discounted bills. In this state of matters he became bankrupt in October 1810, and thereupon Robertson took possession of the third parcel, which he sold for L. 579. 7s. 1d., out of which he paid L. 328. 2s. 4d. of debts due by the joint adventure. Turnbull executed a trust-deed for behoof of his creditors in favour of Morrison and others, the appellants, and it was there stipulated, that in the event of any claim being disputed, it should be laid before the Sheriff-depute of Perthshire, whose decision should be final. To this deed Robertson acceded; and claims were made upon the estate for the outstanding bills of the adventure, to the extent of L.1110. 10s. 5d., in which was included a bill of L.198. 17s. 5d., which had been retired by Robertson, and on which he was ranked. He also claimed on another bill for L.198. 16s. 9d. which he had retired; but this was rejected by the trustees, and it was ultimately found by the Sheriff that he was not entitled to make this claim. Robertson also became insolvent, and the bill-holders claimed upon his estate, which paid a dividend of 12s. per pound, while that of Turnbull paid 8s. 9d. Turnbull died. A dispute afterwards arose between his trustees and Robertson as to their claims against each other, and a submission was entered into, expressed in these terms:—‘ That some differences have arisen relative to some transactions between the said William Robertson and the said deceased George Turnbull, which the parties are desirous of terminating by arbitration. Therefore, they have submitted and referred, as they do by these presents submit and refer, all questions, disputes, differences, and demands competent to the one party upon or against the other, upon any account, or for any cause whatever preceding the date hereof, to the amicable decision, final sentence, and decree-arbitral to be given forth and pronounced by William Bett, banker in Cupar Angus, and George Brown, merchant there, arbiters mutually

April 26. 1825.

‘ chosen by the parties submitters.’ Mutual claims were lodged and answered by the parties, on considering which the arbiters issued the following notes:—‘ The late George Turnbull and William Robertson had a copartnership concern in the purchase, bleaching, and sale, of three parcels of cloth. Mr Turnbull granted acceptances for the price, which were discounted, and the proceeds applied by Robertson, the drawer and indorser of the bills, to pay the price. The whole expense of the purchase of these parcels of goods amounted to L.1840 ‘ 8 ‘ 9
‘ And the bleaching to - - - 328 ‘ 2 ‘ 4

L.2168 6 1

‘ Mr Turnbull failed, and executed a trust-deed on 5th October 1810; and at this time the goods forming the second adventure had been consigned by Mr Turnbull for sale at Glasgow, and were then unsold. The goods forming the third adventure were at Claverhouse Bleachfield, and were taken possession of by Mr Robertson for sale. The proceeds of both these parcels of goods, the arbiters conceive, should have been applied in paying the debts of the copartnership, and must still be so applied; for they understand it to be the law and the universal rule in mercantile transactions, that the funds of every copartnership must be applied, as far as they go, in paying the copartnership debts, before a third party can have any interest therein.

‘ The second adventure brought to Mr Turnbull’s trustees L. 301, and the third to Mr Robertson L. 579. 7s. 1d., and he paid L. 328. 2s. 4d. for bleaching.

‘ At the time of Mr Turnbull’s failure, the bills accepted by him to Mr Robertson, and discounted, and the contents applied by the latter in paying the price of the second and third parcels, amounted to L.1110. 10s. 5d., and they were in the hands of third parties, who discounted them. They were wholly unpaid, and, with the expense of bleaching, formed the undischarged debt against the copartners, and which should have been defrayed from the joint stock, so far as that would go.

‘ Soon after the failure of Mr Turnbull, Mr Robertson also became insolvent. The creditors in the bills above-mentioned ranked, as they were entitled to do, on Mr Turnbull’s funds for the whole amount, and received a dividend amounting to L.457. 17s. 6d. from his trustees. They also ranked on Mr Robertson, and received from him dividends amounting to L. 660. 5s. 10d., which paid these bills in full. The statement by Mr

April 26. 1825. ' Turnbull's trustees, that they paid dividends on bills, where
 ' Mr Robertson was drawer and Mr Turnbull acceptor, to the
 ' amount of L.1222. 1s. 8d. is thus explained: Mr Robertson is
 ' admitted to have been a private creditor to the extent of L.111.
 ' 11s. 3d., which being deducted from the L.1222. 1s. 8d., leaves
 ' the amount of the copartnership bills L.1110. 10s. 5d. as above
 ' mentioned.

' The state of the whole copartnership concerns have this re-
 ' sult. The whole expense of purchases and bleaching
 ' amount to - - - L.2168 6 1

' SALES.

' 1st adventure,	-	L. 880 10 4		
' 2d ditto,	-	301 0 0		
' 3d ditto,	-	579 7 1		
			1760 17 5	
		' Total loss,	407 8 8	
' Half to each partner,	-	-	203 14 4	
' The whole debts have been discharged by the parties, but in ' different proportions.				
' At the date of the failure, Mr Robertson had received no part ' of the copartnership's funds, but Mr Turnbull had received ' from the sale of the first adventure,	-	L. 880 10 4		
' But he paid the original cost,	-	729 13 4		
			L.150 17 0	

' This sum being in the hands of Mr Turnbull when he failed,
 ' Mr Robertson could only have been entitled to rank on his
 ' funds for one-half had the copartnership been closed; but as
 ' this was not the case, he had a preference in law on Mr Turn-
 ' bull's interest in the goods then undisposed of, which, as the
 ' then solvent partner, he was entitled to retain till he was reim-
 ' bursed in a future accounting.

' COPARTNERSHIP ACCOUNT *continued.*

' Balance, as above, in Mr Turnbull's hands when he fail- ' ed,	-	L.150 17 0	
' His trustees received for the second adventure, ' sold after the failure,	-	301 0 0	
		Carried forward,	L. 450 17 0

Brought forward, L. 450 17 0 April 28. 1825.

' The trustees paid dividends on copartnership bills,	-	-	457 17 6
' So there is due them on receipts and disbursements,	L. 6	0	6
' William Robertson, on the other hand, paid com-positions or dividends on copartnership bills, to the amount of	-	-	666 5 10
' And he paid for bleaching copartnership cloth,	-	-	328 2 4
	L. 994	8	2
' Deduct, received by him, proceeds of third ad-venture,	-	-	579 7 1
	L. 415	1	1
' Deduct the above over payment by Mr Turn-bull's trustees,	-	-	6 0 6
	L. 409	0	7

' Mr Robertson, therefore, on these copartnership concerns, has advanced L. 409. 0s. 7d. more than Mr Turnbull or his trustees; and the copartnership funds being exhausted, it appears to the arbiters at present, that Mr Robertson is now entitled to rank on Mr Turnbull's estate for the above sum, and to draw a dividend therefor equal to the other common creditors.

' Mr Robertson makes an additional claim for L. 120 of interest and expenses received and paid by him on the copartnership bills. The arbiters are of opinion, that if he could instruct such payment previous to Mr Turnbull's failure, he would be entitled to rank on Mr Turnbull's estate for one-half; but as no evidence of this has been shewn, the arbiters cannot sustain the claim.

' The arbiters appoint their clerk to furnish the parties with copies of these minutes, and to intimate their orders, that they will be ready to hear any observations thereon within ten days from this date.

(Signed) ' W. BETT.

' GEORGE BROWN.'

A representation was then lodged by the trustees, in which they denied that they had received the proceeds of the second parcel of linens, being L. 301, and offered to prove that such was the fact. On considering that representation, the arbiters

April 26. 1825. notified through their clerk, that they were not inclined to alter their opinion. A letter was then written to them by the trustees, in which they again offered to prove that that money had never come into their hands; but the arbiters caused an answer to be returned by the clerk, stating, ' They do not think it of any importance, whether Mr Turnbull's trustees received the proceeds of the second adventure, because the goods forming this adventure were consigned for sale at Glasgow; and if Mr Turnbull's trustees did not receive the proceeds, Mr Turnbull himself must have done so, or got credit for them; and in either case, the result, so far as Mr Robertson is concerned, must be the same, in making up the copartnership account.' Accordingly a decret-arbitral was pronounced, by which they found, ' That the late George Turnbull and William Robertson entered into a joint adventure in the purchase and sale of three parcels of cloth; and being of opinion that this concern must be kept separate and distinct from any other concern of these parties, or those acting for them, and having made up an account of the receipts and expenditure respecting the said joint adventure, we find that the said William Robertson has advanced in the payment of the debts of said adventure the sum of L. 409. 7d. more than the said George Turnbull or his trustees; and therefore we find him entitled to rank for that sum as a common creditor on the funds of the said George Turnbull, and to draw a dividend therefor corresponding to the amount, equal to the other common creditors of the said George Turnbull, and that being at the rate of 8s. 3d. per pound sterling. We decern the said David Morrison, James Inches, jun. and Robert Hepburn, trustees for the creditors of the said George Turnbull, to pay to the said William Robertson L. 168. 14s. 9d. being the amount of the dividend to which we think him entitled, and that within fourteen days from this date, with interest thereafter till paid.' Of this decree the trustees brought a reduction, on the ground, 1st, That the object of the submission was not to decide any claim by Robertson against them, (which, under the trust-deed, fell to be decided by the Sheriff), but only the claim made by them against Robertson. 2d, That they had not been allowed a proper opportunity of being heard. 3d, That the arbiters had authorized a double ranking, seeing that although the estate had already paid dividends to all the bill-holders, yet they had found that Robertson was entitled to be ranked and draw dividends in virtue of the same bills. 4th, That they had assumed facts to be true which

had been offered to be disproved. And, lastly, That on the principles assumed by the arbiters, they had brought out too large a sum, which, being equivalent to an error calculi, the decree was liable to be set aside. On considering the pleadings, the Lord Ordinary reported the case to the Court, and at the same time issued the following notes of his opinion :—

‘ The Lord Ordinary has advised this cause, and will shortly notice the reasons urged for setting aside the decree-arbitral.

‘ First. It is said that the arbiters exceeded their powers, in so far as the parties never intended to authorize them to decide on any claim to be made by the defender against the pursuers; but on the contrary, the sole end of the submission was to enable them to consider a claim by the pursuers against the defender, and which only was made before the submission was proposed and entered into.

‘ On this the Lord Ordinary will observe, that whatever might have been the state of the claims before the submission was entered into, it is quite clear that it was in the view of parties that mutual claims might be made; and accordingly the submission is of all claims and demands competent to the one party against the other. Had one claim only been in view; that claim alone would have been submitted, but that is not the fact; reciprocal claims were in contemplation, and were referred to the arbiters.

‘ Reciprocal claims and answers were made and judged of; so that there is nothing in this objection.

‘ Secondly. It is said, that the arbiters determined without hearing the pursuers. But this appears equally unfounded, as the very statement of the pursuers proves; for they made repeated representations against the opinions of the arbiters, which were communicated to them.

‘ Thirdly. It is said that, by the judgment of the arbiters, they have authorized a double ranking; and there is no sort of question that this is true: neither does it seem to be disputed by the defender, and there is as little question that this is illegal. But what then? Had the point been tried in this Court, the double ranking would not have been allowed. The creditors in the bills would have ranked upon the bankrupt or trust-estate of George Turnbull, and also on Robertson; but as their claim on Robertson was in virtue of these bills, it is impossible that he could be allowed to rank a second time on them on Turnbull's estate. But the arbiters, in allowing this second ranking, have erred in law and principle: technically speaking, they

April 26. 1825.

April 26. 1825. ' have committed iniquity, which is no ground for setting aside
' their decree.

' Fourthly. It is pleaded, that they have assumed facts to be
' true when proof of the reverse was offered, in so far as they
' held that L. 301, as the price of the second parcel of yarn sold
' by Turnbull, came into the hands of the pursuers as his trus-
' tees, when the latter offered to prove that Turnbull had uplift-
' ed the money previously to the trust.

' The Lord Ordinary considers this plea to be ill-founded.
' The arbiters did not assume the fact that the trustees had re-
' ceived the money: They declared their opinion, that it was of
' no consequence in which way the fact stood. They knew, and
' laid down as established, that Turnbull had uplifted

	L. 880 10 4
' as the price of the first parcel of yarn sold by him;	
' And sold - - - - -	739 18 4

' Whereby he had in his hands a balance of -	L. 150 17 0

' And this they held to be a fund, which, though not ear-marked,
' was one on which Robertson was entitled to a preference, and
' of course was to be applied in payment of the bills pro tanto;
' and, consequently, when they laid down that as law, it is of
' no consequence whether Turnbull or his trustees received the
' L. 301 as the price of the second parcel, since, even admitting
' him to have drawn the money, the same principle which govern-
' ed the former applied to the latter. The arbiters, therefore,
' did not require to, and did not, assume any fact without proof,
' that was any way material in regulating their opinion.

' Lastly. It is said that they have found Robertson entitled to
' rank on Turnbull's estate for L. 409. 7d., in which they have
' committed an error calculi. And here the Lord Ordinary con-
' fesses that he feels much difficulty what to do; for to him it
' seems as plain as arithmetic can make it, that, on the principle
' assumed by the arbiters themselves, viz. that accounts should
' be adjusted between the parties on the same principle as if
' both had been solvent, no such balance as L. 409. 7d. would
' have been due.

' Had Turnbull sold the whole three parcels, and received their
' price, he would have been liable to pay the bills which he grant-
' ed for these goods and the bleaching of them, except Robert-
' son's share of the loss, being L. 203. 14s. 4d. The account
' would then have stood thus:—

April 26. 1826.

Original price of goods L.1840. 3s. 9d., bleach-			
ing L.328. 2s. 4d.	-	L.2168	6 1
Off Robertson's share of the loss,	-	203	14 4
		L.1964	11 9
Of this Turnbull paid L.729. 13s. 4d. and divi-			
dends L.457. 7s. 6d.	-	1187	0 10
	Remains	L.777	10 11
But deduct what Turnbull did not receive, Ro-			
bertson having uplifted it,	-	579	7 1
	Due by Turnbull,	L.198	8 10

' In this way Turnbull would have been owing Robertson, or, in other words, Robertson would have had to receive L.198. 8s. 10d.; and by a different mode of calculation the pursuers bring out a sum of L.203. 5s. 6d.; and in whatever way it is stated, it is impossible to bring out L.409, if Robertson's share of the loss, which he was bound to bear, be taken into computation. The arbiters themselves state the accounts so as to bring out a loss to each party of L.203. 14s. 4d.; but they fail to deduct it. The Lord Ordinary believes the true balance to be as he has stated it, L.198. 8s. 10d. as may be proved by making Turnbull pay back to Robertson the proportion of money that he drew over half of the price of the goods, and then making each pay his half of the prime cost and bleaching. But the Lord Ordinary sees a difficulty in correcting the decree, without setting it altogether aside; and as the case is new, and the decree-arbitral has so many exceptional parts, he thinks that it is worthy the consideration of the Court.'

On advising the cause, the Court, on the 14th June 1822, repelled the reasons of reduction, sustained the defences, and found the trustees liable in expenses; and to this judgment they adhered on the 5th June 1823.

The Judges were unanimously of opinion, that the arbiters had not gone ultra vires; and Lord Robertson observed, that there was no proper error calculi, which must be an error in arithmetic, and not resolvable into an error in point of principle; but that here the arithmetical calculation was perfectly correct.

The Trustees appealed.

Appellants.—1st, Although the deed of submission is expressed in general terms, yet it was truly intended to apply merely to the

April 26, 1825.

claim which the trustees had against Robertson; and accordingly a special provision was made in the trust-deed (to which Robertson acceded) for having any claim against the trustees settled by the Sheriff. 2d, But assuming that the arbiters were entitled to entertain a claim against the trustees, and supposing the principles upon which they had proceeded to be correct, still there is such an error calculi as vitiates the decree. An error calculi does not consist merely in an arithmetical mistake. Although the mere arithmetic may be accurate, yet if some of the admitted elements of the calculation are by accident omitted, there is as evident an error as if, when all these elements were taken into view, there had been some mistake committed in addition or subtraction. But, according to the calculations of the arbiters themselves, Robertson owed to the joint adventure L.454. 19s. 1d., and Turnbull owed L.655. 11s. 4d.; and they held Robertson liable in one-half of the loss upon the adventure. Now, Turnbull's estate paid dividends on the above two sums to the amount of L.452, which, when deducted from the sum of L.655 due by him, left only about L.203 as the balance of full payment; whereas the arbiters had found him debtor to Robertson in L.409; an error arising from omitting to charge Robertson with one-half of his share of the loss; so that it was manifest that this was an error calculi. 3d, The arbiters were not entitled to act on the principle of Turnbull's estate being solvent, seeing that the submission was entered into on the principle of its being insolvent; and, therefore, they have gone ultra vires. But further, in consequence of their acting on the footing of the estate being solvent, they have authorized a double ranking.

Respondent.—It is settled law, that a decree-arbitral can only be challenged on the ground of corruption, bribery, or falsehood; and in this case no such allegations are made. It is true, that if there be an error in arithmetic, it may be corrected at any time, but the error must be in arithmetic, and not an error in point of principle. In the present case, however, there is no error in arithmetic; and therefore, supposing all the statements of the trustees were true, they are utterly irrelevant. The submission was not confined to a claim by the trustees against the respondents. On the contrary, it was perfectly general, embracing claims against each other, and accordingly mutual claims were lodged and answered; and it was not till a late stage of the cause that this plea was brought forward. The objection, that the arbiters have erroneously allowed a double ranking, is not true in fact; and at all events it is irrelevant, because it resolves into a plea of error in judgment, or iniquity.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.' April 26. 1825.

LORD GIFFORD.—My Lords, In the case of Morrison against Robertson, which was heard before your Lordships in the course of the last week, I intimated my intention of moving your Lordships to proceed to judgment on the present morning. I have since considered that case, and the arguments adduced at your Lordships' Bar, to which reference was made; and after very anxious consideration of this case, I must confess it does appear to me that the question is reduced to this, whether or not this award can be impeached on the ground of an error on the part of the arbitrators, or a point of law in the principle on which they have decided? It does not appear to me that the mistake they have committed is one which ranks with what are denominated errors of calculations, but that, if there be an error, it is that which has arisen in their minds on the application of the law to the principles on which they have decided; and as I find that it is a fixed principle in the law of Scotland, that an award of arbitrators cannot be impeached on that ground, it would therefore be very dangerous for your Lordships to come to a decision which would at all touch upon that principle, which is so fully established. Having come therefore to the conclusion that the interlocutors of the Court of Session are right, I would move your Lordships for an affirmance of those interlocutors; but it is not my intention to propose in this case the giving any costs. I shall merely propose to your Lordships the affirmance of the interlocutors.

Appellants' Authorities.—Steele, June 22. 1809, (F. C.)

Respondents' Authorities.—1. Bankton, 23.; 22. Reg.; 1695, 23.; 4. Ersk. 3. 35.; Hardie, Dec. 18. 1724, (664.); Williamson, Dec. 12. 1739, (665.); Heddrington, June 21. 1771, (No. 3. App. Arb.); Kirkaldy, June 10. 1809, (F. C.); Grant, June 23. 1820.

MONCREIFF and WEBSTER—J. RICHARDSON,—Solicitors.

JOHN AITCHISON, Appellant.

No. 18.

MAGISTRATES of GLASGOW, Respondents.

Landlord and Tenant—Riser—Advertisement.—A landlord of several mills on a stream of water having advertised them for lease, and represented that they had an abundant and regular supply of water; and a party having taken one of the inferior mills, without any special stipulation as to the water; and the landlord having let the upper mill, under the condition that the tenant of it should keep his sluices open at least three hours in the day;—Held, (affirming the judgment of the Court of Session),

That the tenant of the lower mill was not entitled to withhold payment of his rent, or to claim damages from the landlord, on the ground of having, by the above condition, been deprived of a sufficient supply of water; reserving his claim of damages against the tenant of the upper mill, if he any had.

May 4. 1825.

2d DIVISION.
Lords Craigie,
Reston, and
Cringletie.

THE Magistrates of Glasgow are proprietors of four mills, situated on a stream called the Molendinar-burn, which has its source in Hoganfield-loch, and, after passing under the walls of the ancient Cathedral of Glasgow, discharges itself into the river Clyde. These mills are known by the names of the Provan-mill, (which is the nearest to Hoganfield-loch); the Town-mill, which is a little farther down the stream; the File or Iron-mill, which is still lower; and the Subdean-mill, which is the lowest. The Provan-mill had, in this way, the complete command of the water, the File and Subdean-mills being entirely dependent upon it; but the Town-mill had a reservoir capable of containing about 240,000 cubic feet of water. From 1755 the Provan-mill had been let under a stipulation, 'that in every twenty-four hours he, the said tacksman and his servants, shall open and draw the sluices three hours, whether the tacksman have grinding or not, for the service of the mills below him.' In 1809 all the mills were out of lease; and the Magistrates then inserted two advertisements in the newspapers, offering, in the one, leases of the Provan-mill and the Town-mill, which were represented as having an abundant supply of water; and in the other, of the File-mill and Subdean-mill, each for 19 years. The advertisement relative to the File and Subdean-mills was thus expressed:—'There are to be let, for 19 years from the term of Whitsunday next, all and whole the mill adjoining the Fir Park, known by the name of the Subdean-mill; also the mill known by the name of the File or Iron-mill. These mills, belonging to the town of Glasgow, are situated on the banks of the Molendinar-burn, have powerful falls, and command, at all times, an abundant supply of water. There is about half an acre of ground attached to the File-mill. Both properties are to undergo considerable repairs, and from their vicinity to the city, and easy access, the tenants of these subjects may always expect as much work as they are able to perform. The terms of set will be seen in the hands of the town-clerks.' On the 14th April, (being a few days after the publication of this advertisement), Aitchison made the following offer for the File-mill, which had been formerly let at a rent of L. 20:—'I hereby make offer to take a lease of the File-mill and ground for 19 years from Whitsunday first, as they presently stand, at the rent of

'L. 70 sterling; and, in lieu of repairs, to have the first year's rent allowed me, towards erecting a water-wheel and clearing out the mill-race.' On the following day he sent to the Magistrates another offer, which was thus expressed:—'In case my offer for the File-mill is not accepted, I am willing to take a lease of the Subdean-mill and ground for 19 years;' and he farther stated, that 'I have made these offers on condition that I shall have liberty to grind all sorts of grain free ofucken or dues to the Town mills; also the miller at Provan is bound to let out a daily supply of water from the lochs when the mill is not going regularly.' The former of these offers was accepted by the Magistrates, on the 21st, in these terms:—'We accept of the within offer of L. 70 for the File-mill per annum, and to give up the first year's rent towards erecting a water-wheel, and leaving the water-wheel on the property at the end of the lease; Mr Aitchison finding security to the satisfaction of the committee.' The Provan-mill was taken by a person of the name of Millar; the Town-mill by one Wright; and the Subdean-mill by Tassie and Company; and each of these persons, as well as Aitchison, entered into possession in virtue of missives. A lease was thereafter granted of the Provan-mill to Millar, in which it was stipulated, that he should 'open and draw, and allow to remain open, the sluices of his dam and lades hereby set, whether he is grinding or not, for the service of the mills below the said Provan-mill, and that during any three hours in the course of every twenty-four hours which the Magistrates of Glasgow, for the time being, shall think most proper.' A lease was proposed to be granted of the Town-mill to Wright, containing a clause that he should be bound 'to open and draw, and allow to remain open, the north sluice of the dam and lades of the premises set, regularly every day, whether working or not, for the supply of the mills below;' but Millar refused to subscribe this lease, as no such unlimited obligation was imposed on the tenant of the Provan-mill. A lease was also offered for the signature of Aitchison, containing an obligation to the same effect; but he in like manner refused to sign it, unless a declaration were inserted, 'that the tacksmen of the Provan-mill and Town-mill shall be held to let down their water, in a regular manner, every lawful day during working hours.' Tassie and Company subscribed a lease of the Subdean or lowest mill, without any such stipulation.

Repeated complaints were made by Aitchison to the Magistrates, that he was unable to carry on his operations in conse-

May 4. 1825.

May 4. 1825. quence of the water which was sent down from the upper mills being insufficient, and he therefore refused to pay any rent. In 1813 the Magistrates presented a petition to the Sheriff of Lanarkshire, praying for warrant of sequestration 'until caution be found for payment of the rents due and to become due;' and to ordain him to execute and subscribe a regular tack, with sufficient caution; and failing thereof, to grant warrant of ejection. On the other hand, Aitchison brought an action concluding for damages, and to find him entitled, 'as tacksman of the said mill, to the command of an abundant supply of water at all times during his lease, and decern the said defenders immediately to procure the said supply, and grant a regular lease with an obligation to that effect.' In the former of these actions the Sheriff ordained Aitchison 'to execute and subscribe a regular tack of the mill in question, with sufficient caution;' and in the other action, he assoilzied the Magistrates. And thereafter, on advising a petition by Aitchison, he pronounced this judgment:—'Finda, that the advertisement for letting the town's mills, founded on by the pursuer, did not supersede the duty incumbent on him of examining and making inquiry into the state and circumstances of the subjects previous to his offer, and that it must necessarily be presumed that he did so, and was satisfied: Finds, that the agreement for a lease of the Malt or File-mill was constituted betwixt the parties, by the offer dated 14th April 1809, which is accepted on the back by the Convener of the Committee for Mills on the 21st of April following, and by such of the pursuer's subsequent missives as were accepted by the said committee; but finds, that the pursuer's letter of the 15th of April 1809, which relates to the Subdean-mill, was not accepted by the committee, nor the proposed conditions therein agreed to by them: And in respect it does not appear that the lease of Provan-mill, entered into betwixt the defenders and James Miller, contains any clause injurious to the pursuer's right to the water at common law, but is averred to be framed in the same terms as the lease of that mill has always been heretofore, which last point the pursuer does not controvert, finds, that the pursuer has no relevant claim against the defenders for or on account of any alleged deficiency of or irregularity in letting down the water; and therefore assoilzies them simpliciter from this action, as well the conclusion for damages as that for execution of a lease, seeing that a lease, made out in terms of the missives of agreement, has been subscribed by the defenders, and is lodged in process, ready for being executed

May 4. 1825.

‘ by the pursuer : Reserves to the pursuer all claims he may have
 ‘ against the tenants or occupiers of the superior mills, for the
 ‘ illegal or improper use of the water, if he is advised to insti-
 ‘ tute the same, and to them their defences as accords ; and with
 ‘ this explanation, and these findings, adheres to the interlocutor
 ‘ complained of, and decerns.’ Both cases were then brought
 into the Court of Session by advocation, and having come before
 Lord Craigie, he conjoined them, and ordained the Magistrates
 to produce certain documents, and to condescend as to certain
 allegations inferring acquiescence ; and in reference to a statement
 which had been made by them, as to regulating the supply of
 water, he issued the following note :—‘ The Lord Ordinary would
 ‘ wish to know whether the Magistrates of Glasgow, when tak-
 ‘ ing the opinion of Messrs Rennie and Telford, made any
 ‘ inquiry as to the proper mode of regulating the supply of water
 ‘ to the different mills, so that it might be made as useful as
 ‘ possible. It likewise appears to the Lord Ordinary, that when
 ‘ the new tenants came to differ on this point, recourse ought to
 ‘ have been had to such opinions, instead of adopting, in the
 ‘ lease of Provan-mill, a rule which apparently had no recom-
 ‘ mendation but that of having been followed when the art of
 ‘ constructing mills and mill-lades was very little known or
 ‘ attended to ; and although it would be improper at this time
 ‘ to produce opinions on the subject without authority from the
 ‘ Lord Ordinary, he thinks that the advocator should have an
 ‘ opportunity of stating what regulations ought to have been
 ‘ prescribed in the several leases for the general advantage.’
 Thereafter the case came before Lord Reston, who, after an
 interlocutor allowing a proof, which Aitchison represented
 against, pronounced this judgment :—‘ In respect that the
 ‘ condescendence for the Magistrates of Glasgow, on the plea
 ‘ of homologation and acquiescence, is vaguely expressed, and
 ‘ of doubtful relevancy ; and that the Magistrates seem to
 ‘ concur with the representer in wishing a judgment on the
 ‘ rights of parties, independent of that plea, recalls the former
 ‘ interlocutor, advocates the cause, and finds that the four mills
 ‘ belonging to the Corporation of Glasgow, being all out of
 ‘ lease, they were offered to be let by an advertisement, bearing
 ‘ that they commanded at all times an abundant supply of water,
 ‘ and referring to terms of set in the town-clerk’s hands : Finds, it
 ‘ admitted, that the terms here referred to were marked on a me-
 ‘ morandum, which bore, that the water would be let down
 ‘ regularly : Finds the clause in the Provan-mill lease, securing
 ‘ the water being let down to a mill (having no dam or reser-

May 4. 1824. 'voir) three hours in twenty-four, is not reasonable implement
' of the obligation arising from the memorandum; and that the
' pursuer, unless in so far as he may have virtually consented
' thereto, is entitled to any damages he can qualify from it, and
' allows him to lodge a condescendence accordingly.' Against
this judgment the Magistrates lodged a representation; but
Lord Reston having died, the case was transferred to Lord
Cringletie.

In the meanwhile the Magistrates had raised an action against
Tassie and Company, for payment of rents, which they resisted
on the same grounds as Aitchison, viz, that they did not receive
a sufficient supply of water, which they alleged the Magistrates
had bound themselves that they should have. On the other hand,
Tassie and Company brought an action against the Magistrates,
and Miller and Wright, the tenants of the upper mills, conclud-
ing for a supply of water, and damages. In these actions a re-
mit was made to Mr Jardine, engineer, to examine the premises
and report; and he having done so, and a copy of his report
having been lodged in the process between the Magistrates and
Aitchison, Lord Cringletie pronounced this judgment:—' The
' Lord Ordinary having resumed consideration, is satisfied that
' the interlocutor complained of by said representation is partly
' founded on a mistake, in the then Lord Ordinary conceiving
' that the water necessary to drive the File-mill depended en-
' tirely on the regulation of the sluices of Hoganfield-loch and
' the Provan-mill, as by that interlocutor his Lordship finds,
' that the clause in the Provan-mill lease, securing the water
' being let down to a mill having no dam or reservoir three
' hours in twenty-four, is not reasonable implement of the obli-
' gation arising from the memorandum, on the faith of which
' Mr Aitchison took his lease. In this way his Lordship seems
' not to have been aware that the Town-mill is situated between
' the Provan-mill and the File-mill in question, and has a reser-
' voir containing 240,000 cubic feet of water, on the proper re-
' gulation of which must chiefly depend the supply of water to
' the mill in question: Finds, that there is no special regulation
' of the water in this last reservoir contained in the lease of the
' Town-mill; and, consequently, that if Mr Aitchison had any
' want of water for his mill, it arose from the impropriety of the
' management of the miller of the Town-mill, for which the Ma-
' gistrates of Glasgow are not responsible, as it was open to Mr
' Aitchison to complain of that miller withholding the water
' when the mill was not working; and when the mill was work-

ing, there could be no ground of complaint, as the water which
drove the one mill passed on to the other: Finds, that from Mr
Jardine's report it by no means appears, that the regulation in
the lease of Provan-mill, viz. that the miller shall open the
sluice of Hoganfield-loch three hours in the twenty-four, is
improper, and inadequate to the supply of the other mills; for
Mr Jardine does not report that the sluices should be longer
open, but only recommends some regulations for giving greater
effect to the opening of that sluice, and suggests a project for
enlarging the quantity of water in Hoganfield-loch, which the
Magistrates of Glasgow have found to be impracticable, on ac-
count of their not being proprietors of the ground which would
be covered by the additional water: Finds, therefore, on the
whole, that Mr Aitchison has no reason to complain of the re-
gulation in the lease of the Provan-mill: Finds further, that
even if Mr Aitchison had reason to complain of that regulation;
he has not relevantly condescended on any damages, or any
grounds on which they could be ascertained; and therefore, on
the whole, alters the interlocutors complained of by said repre-
sentation, and remits both causes simpliciter to the Sheriff:
Finds the Magistrates entitled to the expenses of the question
about caution, and also to the expenses of the advocations, sub-
ject to modification.' Against this judgment Aitchison reclaim-
ed to the Inner-House; and, at the same time, the case between
Tassie and Company, and the Magistrates and tenants of the
upper mills, was reported to their Lordships. Both cases were
advised upon the 16th May 1822; and in that of Tassie and
Company their Lordships pronounced this judgment:—Find
that the defender, James Miller, is bound by the stipulations
contained in his lease of Provan-mill, to open and draw, and
allow to remain open, the sluice in the dam of Hoganfield-loch,
at least three hours in every twenty-four hours; and also to
allow the passage from the reservoir of Provan-mill of a quan-
tity of water, equal to that discharged during the said three
hours from the Hoganfield-loch, beginning the said dis-
charge from the reservoir of the Provan-mill as soon as the
water therein is in a state to work the said mill, and continuing
it without intermission, at the rate usually required to work the
said mill, till the whole of the three hours' run from the loch is
discharged, and that whether the mill be working or not:
Find, that the said John Wright is bound to send down the
water regularly for the supply of the Subdean-mill, whether the
Town-mill be working or not, and decern accordingly; and

May 4. 1825.

May 4, 1823. 'before answer as to damages, appoint the pursuers to give in a 'special condescendence of the damages claimed by them; and 'reserve till the issue of the cause the consideration of all claims 'of expenses hinc inde.' The case of Aitchison was then taken up, when their Lordships, 'in respect of the decision in the 'question between Walter Tassie and Company, and the Magis- 'trates of Glasgow and the tenants of Provan-mill and Town- 'mill, adhere to the interlocutor reclaimed against, and refuse 'the desire of the petition; and remit to the Lord Ordinary to 'hear Counsel for the parties as to the point of caution, and to 'do therein as to his Lordship shall seem just.* Certain pro- ceedings then took place relative to the finding of caution, and decree was ultimately pronounced against Aitchison, ordaining him 'to execute and subscribe a valid tack of the mill in ques- 'tion, in terms of the second conclusion of the original complaint, 'along with a sufficient cautioner, bound jointly along with him 'for the prestations incumbent on him;† also for a certain sum of rent, and expenses of process. Having been charged in terms of this decree, he presented a bill of suspension, on the ground that his estates had been sequestrated under the Bank- rupt Act in 1812, and that he had obtained a discharge in 1813; so that all previous claims, including these rents, were discharg- ed. Lord Cringletie refused the bill, in respect of the final de- crees of the Court, and that Aitchison had, subsequent to the date of the discharge, subscribed a bond of caution; and to this judgment the Court adhered on the 7th June 1823, in respect no caution was offered.†

Aitchison appealed.

Appellant.—The advertisements held forth to the appellant that he was to have a proper supply of water, and on this faith he took the lease of the mill. Accordingly, in the offer of the 15th of April, he expressly mentioned, that both offers were made on the condition that the miller at the Provan-mill should let out a regular and daily supply of water. Notwithstanding this, the respondents entered into an agreement with that tenant, by which he was not compellable to keep his sluices open more than three hours in the day, which was quite insufficient for the supply of the inferior mills. As the appellant, therefore, has not received implement of this important condition, he is not liable in rent,

* See 1. Shaw and Ballantine, Nos. 553. and 534.

† 2. Shaw and Dunlop, No. 357.

and, on the contrary, is entitled to damages from the respondents. May 4. 1825.

Respondents.—Advertisements are mere recommendatory notices, and are never understood to form the bargain between the parties, but only to induce intending offerers to make inquiries. Accordingly the appellant made inquiries, and, in his offer for the Fife-mill, he proposed to take it and the adjacent ground ‘as they presently stand,’ without any stipulation whatever in regard to any regulation for the supply of water. The existing regulation at the time, and for many years previously, was precisely the same as that which was inserted in the lease to Miller. The respondents, in that lease, stipulated that Miller should keep his sluices open for at least three hours in the day; and if the appellant could shew that he was entitled to compel Miller to keep them open for a longer period, there was nothing in the clause to prevent him doing so.

The House of Lords ‘ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.’

SPEETISWOODE and ROBERTSON—J. DUTHIE,—Solicitors.

HUGH DEWAR and Others, Trustees of JOHN M’KINNON CAMPBELL, Appellants.—*Sol.-Gen. Wetherell—Adam.* No. 19.

Mrs ELIZABETH CAMPBELL or M’KINNON, Respondent.
Abercrombie—Kedy.

Res or Liferent—Clause.—A lady who was heir of provision to certain estates, having by her contract of marriage, in the event of succeeding to them, disposed them, ‘under the reservation of her own and her husband’s liferent right and use thereof,’ ‘to and in favour of the heir-male of this marriage;’ and having succeeded to them;—Held, in a question between her and the heir-male of the marriage, (affirming the judgment of the Court of Session), That she was fief of the estates.

In 1751 Archibald Campbell, proprietor in fee-simple of the lands of Ormaig and Blairintibbert, disposed them, by a contract of marriage between his daughter Catherine and John Campbell, to them ‘in conjunct fee and liferent, but for his liferent use alienably, and after their decease to the heirs-male to be lawfully procreated of their bodies of the said intended marriage, which failing, to the heirs-female to be procreated thereof,’ in

May 5. 1825.

2D DIVISION.
Lord Pitmilley.

May 5. 1825. their order. Of this marriage there were two children—a son James, and a daughter, the respondent, Elizabeth.

On the 17th of February 1780, Elizabeth being about to be married to the Reverend John M'Kinnon, minister of Kilfinnan, an antenuptial contract was executed between them; the material clauses of which were in these terms:—‘ In consideration of the said marriage, the said Elizabeth Campbell, with consent aforesaid, hereby assigns and disposes to and in favour of the said Mr John M'Kinnon, in liferent during all the days of his lifetime, all and sundry provisions, donations, legacies or others, made and granted in her favours by the now deceased Archibald Campbell of Ormaig, her grandfather; and also all and sundry provisions, legacies, or donations already made or to be made in favours of the said Elizabeth Campbell, by Alexander Campbell, Esq. of Grenada, James Campbell, Esq. of Tobago, her uncles, John Campbell of Ormaig, her father, and James Campbell, son to the said John Campbell, or any of them, or by any other person or persons any manner of way. Farther, the said Elizabeth Campbell assigns and disposes to and in favour of the said Mr John M'Kinnon, in liferent as said is, all and sundry lands and heritages that she shall succeed to, during the marriage, any manner of way: And the said Mr John M'Kinnon and Elizabeth Campbell hereby bind and oblige them severally, that how soon the said provisions, legacies, donations, or other subjects already provided, or to be provided in the said Elizabeth Campbell's favours, shall be paid to or recovered by them, that the same shall be laid out, at the sight of two of her nearest relations, in the hands of a sufficient person or persons, and that the security therefor shall be taken payable to the said Mr John M'Kinnon and Elizabeth Campbell, in conjunct fee and liferent, and the fee thereof to the children of this marriage, whom failing, to the said Elizabeth Campbell, her heirs and assignees whatsoever: And, in the event that the said Elizabeth Campbell shall succeed to the lands of Ormaig and Blairintibbert, she hereby, under the reservation of her own and the said Mr John M'Kinnon's liferent right and use thereof, and other conditions after-mentioned, assigns and disposes all and sundry the said lands of Ormaig and Blairintibbert, with the pertinents, to and in favours of the heir-male of this marriage, whom failing, to the heir-female thereof; declaring always, that in the event of the said Elizabeth Campbell's succeeding to the said lands, that the heir-male or heir-female

May 5. 1826.

'succeeding to the said Elizabeth Campbell therein, shall pay,
 'and is hereby burdened with the payment of two hundred
 'pounds sterling to the younger child or children of the mar-
 'riage, if any be, and that against the term of Whitsunday or
 'Martinmas next and immediately following such heir's succeed-
 'ing me in the said lands, with the legal annualrents thereof
 'from and after the said term of payment till payment thereof;
 'and also declaring that the heir of this marriage, whether male
 'or female, that may happen to succeed the said Elizabeth
 'Campbell in the foresaid lands, shall be obliged to assume and
 'bear the surname and designation of Campbell of Ormaig:
 'Moreover, the said Mr John M'Kinnon hereby assigns and dis-
 'pones, to and in favour of the said Elizabeth Campbell, in the
 'event that no child or children shall be procreate and existing
 'of the marriage at the dissolution thereof, the just and equal
 'half of the whole moveable subject that shall happen to per-
 'tain and belong to him and the said Elizabeth Campbell, in
 'common, at that period: But in the event of a child, one or
 'more, then existing, the said Mr John M'Kinnon assigns and
 'dispones to the said Elizabeth Campbell one-third part only of
 'the said moveable subject: And it is hereby provided and de-
 'clared, that in the event the said Mr John M'Kinnon shall
 'marry a second time, during the existence of a child of this
 'marriage, then and in that case, the liferent provisions above-
 'mentioned, conceived in favours of the said Mr John M'Kin-
 'non, shall cease, and are hereby declared to be null and void
 'as to him, from and after the eldest child of this marriage then
 'in life attaining the age of twenty-one years complete, and such
 'liferent provision shall thereafter pertain and belong to the
 'child or children of this marriage: And, on the other hand, if
 'the said Elizabeth Campbell shall happen to marry a second
 'time, and that there shall be a child or children of this mar-
 'riage then existing, the liferent provisions reserved to the
 'said Elizabeth Campbell by this contract, whether proceed-
 'ing from the rents of the said lands or otherwise, shall, and are
 'hereby restricted, after her second marriage, to the sum of
 'thirty pounds sterling yearly, and the remainder shall pertain
 'and belong to the children of this marriage.'

On the death of his parents, James Campbell succeeded to the
 estates, and made up titles in 1789, by service to his mother,
 Catherine, as heir of provision under the contract of 1751.

Of the marriage between Mr M'Kinnon and Elizabeth Camp-
 bell, there were two sons, of whom the eldest was John. In

May 5. 1825. 1805 Mr M'Kinnon died, and soon thereafter James Campbell also died without issue. Mrs M'Kinnon then obtained herself served heir of provision to the estates of Ormaig and Blairintibbert, under the contract of 1751; and on the credit of them she raised money, by granting heritable bonds as fiar of the estates, which she alleged was applied to the benefit of her son. Thereafter, one of her creditors having proceeded to attach the estates by adjudication, her son, John, claimed them as being fiar under her contract of marriage. To try this question, he brought an adjudication in implement against his mother, in which he set forth, that she 'was bound to have executed all deeds necessary for properly and feudally vesting the said lands and estate, under the said reservations and other burdens and conditions, in his favour, and particularly to have made, granted, subscribed, and delivered, a valid and sufficient disposition of the said lands and estate of Ormaig and Blairintibbert and others, to and in favour of the pursuer as heir-male of the said marriage, whom failing, to the heir-female thereof, under the reservation and other burdens and declarations and conditions before-mentioned, &c. and to deliver therewith the title-deeds in her possession, in order that the heritable and irredeemable right of the said lands, burdened as aforesaid, may be properly vested in the person of the said pursuer, as heir-forsaid, according to the true intent and meaning of the said contract of marriage, and obligation therein contained.' And he then concluded for adjudication, under reservation of her liferent. This action was at first opposed by the adjudging creditor; but the debt having been settled, defences were lodged by Mrs M'Kinnon, in which she contended, inter alia, that, by the contract of marriage libelled on, the fee was vested absolutely in her.

In the meanwhile John died, and the appellants, his trustees, were then sisted as pursuers in his place.

In support of the action they maintained,—

1. That as the stipulation in the contract of marriage was, that 'in the event that the said Elizabeth Campbell shall succeed to the lands of Ormaig and Blairintibbert, she hereby, under the reservation of her own and the said Mr John M'Kinnon's liferent right and use thereof, and other conditions after-mentioned, assigns and disposes all and sundry the lands of Ormaig and Blairintibbert, with the pertinents, to and in favour of the heir-male of this marriage; and as her eldest son John was the heir-male of the marriage, she thus came under an effectual obligation to dispoise to him these lands, under reservation of her own liferent. And,

2. That it was plain, from the whole terms of the contract, and more especially from the clause restricting her liferent in the estates to L. 80 in case of entering into a second marriage, that it was the meaning and intention of the parties that she should only have a liferent; and that as this was a question not with creditors, but with the heir, as to what was the meaning of a contract of marriage or family arrangement, effect should be given to what appeared to be the intention of the parties, and that that intention ought not to be superseded by a strict technical interpretation of the words employed.

To this it was answered, —

1. That as it had been established, by a series of decisions, that where an estate is disposed to a parent in liferent, and children nascituris in fee; without any restrictive words, the fee belongs to the parent, it was plain that, on applying this rule to the words of the deed, the fee was vested in the respondent, and not in the heir-male to be procreated. And,

2. That if such were the true construction of the dispositive clause, then it was not competent to controul it by expressions in other parts of the deed; but supposing it were so, then, as she was fiar under the contract of 1751, it was necessary to shew a clear divestiture by her of that fee; whereas, instead of there being any clause to that effect, the whole scope of the deed shewed that it was the understanding of parties that she was the fiar; and, accordingly, her succession to the estates prior to that of the heir-male was distinctly contemplated, and there was no destination to the heirs of her husband.

The Lord Ordinary having considered the extract registered contract of marriage libelled on, and whole process, found that the fee of the lands in question is vested in the defender, Mrs Elizabeth Campbell; sustained the defences pleaded for the said defender; and absolved her from the conclusions of the libel.* To this interlocutor the Court, on the 5th of December 1820, on advising a petition, with answers, adhered, and found expenses due; and on the 5th of February 1821 they refused a petition without answers.*

The trustees having appealed,

The Lord Chancellor, in the course of the Solicitor-General's reply, observed, "I understand that you mean to contend, that the deed is to be read as if the word alienarily had been in it. You mean also to contend, that there are other re-

* Not reported.

May 5. 1825. strictive words equivalent to allenary. It has been stated that that is a new point, not argued before the Court of Session. You state, that there is another new point made on the other side of the Bar, namely, that if the word allenary had been in this contract, the titles must have been made up in the way they were at the time the inheritance came to her, under this contract. Now that also is said to be a new point not before the Court of Session. Then there arises the question, whether we are to deal with both of these in point of form without remitting the cause? If the word allenary had been there, you would have contended in this way,—that if, previous to the estate becoming here, there were children born, the doctrine that arises where there is the term *nacituri*, will not apply, for the fee would not in that case have been pendent, for the inheritance must be vested in her children; and that if the children were *nascituri*, the parent ought to be made fiduciary for the children,—a doctrine as to which Lord Rosslyn said, (being rather more of a north-countryman than I am), that he did not understand what it meant. I should be disposed, without much farther consideration, to send this back to the Court of Session, desiring them to consider the point, but that remits seem very unpopular just now. I would not, therefore, wish to do it if I could help it.”

The Solicitor-General having proceeded in his reply:—

The Lord Chancellor again observed, “I think what Lord Rosslyn meant was, that the Court of Session had so frequently decided, that, where the word “only” was not in the settlement, the fee should be considered as being in the parent, that he would not determine that the word “only” should make any distinction, but that he could not understand how the parent would be a fiduciary. Whether that is understood in Scotland, I cannot say.”

The Solicitor-General having again proceeded:—

The Lord Chancellor observed, “According to the English law, the son would not be bound to pay one farthing; for his obligation would arise only out of his taking this estate by virtue of this instrument. According to the English law, I take it to be as clear as the sun at noon-day, that no child of this marriage would have been bound, by this contract, to pay the L.200, unless he took under this contract. Then how is that clause to operate in the case mentioned, that of the wife’s estate being restrained to L.30 a-year?”

The House of Lords ‘ordered and adjudged, that the appeal ‘be dismissed, and the interlocutors complained of affirmed.’

LORD CHANCELLOR.—My Lords, the Solicitor-General of England May 5, 1825. has expressed a doubt, whether his mind is not in the situation of being a good deal influenced by his notions of the law of England. I would fairly say, that I am conscious that may be equally the case with my mind; and I hope that may afford an excuse, not unreasonable, for my desiring of your Lordships some time to consider of this important case. I cannot help representing that my mind may be in some danger of being misled by the doctrines of the law of England, taking care, as I would at the same time, to state, that there is no principle which I have held more sacred, ever since I have had the honour of assisting your Lordships in judicial matters respecting the law of Scotland, than to recollect, and to act upon that recollection, that we are sitting here as the Court of Session in Scotland, to decide as that Court ought to decide, and that we are bound not to apply our English principles, and our English doctrines, in judicial decisions upon the law of Scotland.

My Lords,—Perhaps this is a case which has a stronger tendency to mislead an English lawyer than most cases have, because the distinction in our law with respect to immediate conveyances, and contracts for conveyances, is so well settled, that a man's mind is apt to dwell, perhaps too readily, on matters that are extremely well settled. Your Lordships know, that, in conformity to what is here stated to be the law of Scotland, if an immediate conveyance is made of lands to A for life, with remainder to the heirs of his body, or remainder to his right heirs, though that estate is given him only for life, yet, on settled principles, he has the fee in him, by virtue of the estate tail, with remainder to the heirs of his body, with the remainder in fee to himself. This doctrine is carried so far, that, even in wills where it appears to be the general intension of the testator that the person shall not take an estate merely for his life, still, although it is expressly given him for life, you sacrifice the particular intension to the general intension of the testator, and you give him an estate tail. A more remarkable case cannot be stated than the case *Robinson v. Robinson*, in which an estate was given to a man for life, and no longer, and yet he was held to have an estate of inheritance on account of the general intension of the testator.

With respect to a marriage-contract, there can be no manner of doubt that, according to what is held to be the effect of a marriage-contract, an agreement to convey an estate in future, we should take great care so to limit the estate, that the children should not have merely a spes successionis, but that they should have a secure estate of inheritance vested in them, though, if the same words had been used in an ordinary disposition, those children would have taken no estate, unless they took by inheritance from their parent.

Now, there is one principle in the law of Scotland which is common to the law of England, and I take it to be this:—In the first place, If

May 5. 1836. you find points settled, particularly points of title, you must take infinite care not to disturb them on slight reasons of distinction; and, that although the mind of the individual who is to discharge the duties of a Judge may possibly suggest, and without his being able to get rid of the effect of that suggestion, that the actual intention of the party was different from that which is the implied intention of certain words that have been long settled to have a definite meaning, you must dismiss the reasoning that the individual applies upon the subject, and take yourselves to, and give the parties the benefit of, that implied intention which has been considered to be the meaning of the words, that have frequently, and during a long period, received judicial interpretation, though that judicial interpretation may be contrary to that which ought originally to have been put upon these words.

My Lords,—There is another reason why I feel particularly anxious to have a little time to consider this case, and I will fairly avow that it arises, not perhaps from circumstances connected only with this case, but from circumstances connected with your general administration of justice in Scotch causes. My Lords, there is a great degree of inconvenience, I am ready to admit, in frequently remitting causes for farther consideration to the Court of Session. It is impossible to deny that it leads to a great deal of delay, and a great deal of expense. On the other hand, it must never be forgotten, as it appears to me that your Lordships, forming a court of judicature, run a very great risk, if the points are first discussed at your Bar, and first decided upon there, whether you are right or wrong, because you are a court of appeal, and the great doctrines of the law of Scotland ought to be originally discussed, and decided in Scotland; and, having been overlooked in the Court below, you run the risk of making the decision, which you must do as the Court of Session, in a way which the Court of Session itself, if the matter had been discussed before it, would not willingly have acceded to, as stating properly the doctrines of their law.

My Lords,—I remember perfectly well what it was that led to the remittances, at a particular period, when there were a great number of them;—it originated in a conversation held between my Lord Thurlow and my Lord Rosslyn, in this House, soon after I had the honour first of sitting upon your Lordships' woolsack: the particulars of that conversation it may not be necessary or fit for me to state now, but I shall very readily communicate the substance of it to any of my friends, the lieges of Scotland, who are at your Lordships' Bar, who may wish to know what the nature of that conversation was.

Now, there are some important points in this case which have been discussed, and, as far as one collects from the papers, have been discussed for the first time; and it will remain for consideration, whether it will become necessary to consider of them in disposing of this cause, and in what way this House ought to dispose of it. My Lords, in res-

May 5. 1825.

pect to the doctrine itself, I should take it to be clearly established, (and whether right or wrong it is not of much consequence to inquire, when the point is clearly established), that if there is a limitation in a conveyance of an interest in presenti, and unconnected with any question of contract, as between man and his wife, and the children of the marriage, on feudal principles, the fee is in the parents, — one of the parents is the fee — which of the parents depends upon the circumstances ; — and it is impossible, in my view of the case, to read what fell from my Lord Barlow in the case of Newlands, without seeing that it was his notion, that after that doctrine was once clearly established, it would have been infinitely better to have adhered to that doctrine, than to deny the application of that doctrine. Because the word ‘ alienably ’ was used. That appears to me to have been his meaning ; but his Lordship would not venture upon those doubts about the impropriety of introducing that distinction to disturb that which had been settled, because the distinction had been adopted in the law of Scotland, because, in the administration of the law of Scotland, settlements had been construed by applying that distinction ; and so it was held.

Then comes another question, which undoubtedly is a question of great importance, whether, if the word alienably makes a distinction, there are other words, or other provisions in this instrument, that shall be of the same effect as the word alienably. I am ready to go this length, namely, to say, that as this House was advised, by my Lord Rosslyn, that the effect that was originally attributed to the word alienably ought, in his judgment, still to be attributed to it, so it ought to have that effect ; at the same time, I apprehend your Lordships will take great care not to extend the effect of that word farther, unless you are convinced that you ought to extend it farther.

My Lords, — I have not the slightest hesitation in saying, that if this was an English contract of marriage, I could not bring my mind to say that there ought to be an original limitation to the children ; but it is quite a different question what ought to be the principle applied to it, taking it to be a Scotch instrument. It must be admitted there are clauses in this instrument, particularly with respect to the personal estate, which would appear to me, even according to the law of Scotland, to go a long way to bring this case, if it related to the personal estate, within the authority of the case of Seton ; for nothing is more clear than that there is an agreement, that whenever a sum of money shall be uplifted or recovered, a security shall be taken for that in the names of trustees, as I understand it, for the father and mother and children. The doctrine in the case of Seton was this, that because trustees were to have the property, therefore the fee could not be in pendente, but that it was in the person who was trustee, and therefore the general doctrine should not apply ; and I agreed so far with my Lord Rosslyn, that unless you are to consider the parent in those cases in which you hold him a fiduciary to be a trustee, it is

May 5. 1825. very difficult to say how you get the case out of the general rule, that the fee is not to be considered in pendente.

But then there is another way of looking at the case, which is this: Supposing that would be the true way of considering the matter as to the personal property, Would the intimation that such is to be the application of the personal property be sufficient to authorize you to say, that, with respect to this estate of Ormaig, a similar decision should be made? And that brings it back to the question, Whether intimations of intention, scattered throughout the contract, are to have the same effect as the words in the cases alluded to have been determined to have, namely, to give the children an estate distinct from their parents? My Lords, it is an extremely difficult thing for an English lawyer to find out, in any event, if the heir-male of the marriage or the heir-female of the marriage did not take under this contract, how the heir-male of the marriage or the heir-female of the marriage would be bound to pay one shilling of that L. 200. But then we must not apply a difficulty which applies to English cases, and insist, that because that difficulty arises in English cases it will in Scotch, though the mind of the English lawyer cannot possibly find out how the estate of the wife, in the case mentioned, was to be restricted to L. 50-a-year, if the wife was to take the inheritance under this contract. That is a puzzle in the mind of an English lawyer, and perhaps the mind of an English lawyer is apt to be puzzled. How far our doctrines are to be reconciled with this case is, I think, that which we ought to dismiss from our minds entirely; for the case must be decided according to what is the settled doctrine of the law of Scotland. And what is the settled doctrine of the law of Scotland we must endeavour to find out by what has been decided in the Courts of Scotland, regard being had also to that which has been decided in matters of the same nature in this House. For me, my Lords, I am only doing justice to myself when I say, that I never have intentionally approached to a conduct so grossly wrong as to intimate to your Lordships that you ought to apply English rules in the decision of such causes; and I hope and trust, that to the last moment to which I shall have the honour of advising your Lordships, I shall do my utmost to put you in mind that it is your positive duty to apply the law of Scotland to all Scotch causes, and to act here as you would do on the application of the legal doctrines if you were sitting in the Court of Session in Scotland. Having made these few observations, I will humbly propose to your Lordships to allow a week or ten days for the examination of cases bearing upon this point, before your Lordships are moved to come to a decision.

LORD CHANCELLOR.—There is a cause which was heard before your Lordships several weeks ago, in which a gentleman of the name of Dewar, and others, are appellants, and a Mrs Campbell, or M'Kinnon, and others, are respondents. It arises from an action of adjudication in

implement brought before the Court of Session in Scotland, for the purpose of trying the legal question, whether Mrs Campbell can be restricted to a mere liferent of the property in dispute, or whether she is entitled to the fee of the property? May 5. 1835.

In defence, Mrs Campbell founded upon her marriage-contract with Mr M'Kinnon in 1780, as vesting her with the absolute fee of the estate. She also propounded three other defences, to which I shall not now call the attention of your Lordships.

My Lords,—This question having come on to be argued before my Lord Pitmilley as Lord Ordinary, that learned Judge, upon the 8th of December 1818, pronounced an interlocutor, finding that the fee of the lands in question is vested in the present respondent, Mrs Elizabeth Campbell; and his Lordship adhered to the interlocutor, upon considering a representation and answers for the parties.

My Lords,—The cause was then brought under the review of the Court of Session, in the Second Division, by a reclaiming petition on the part of the appellants, when the Court refused that petition, and adhered to the interlocutor of my Lord Pitmilley; as they also did upon a second petition from the same parties. There was yet another interlocutor of the Court afterwards pronounced; but as it relates solely to the costs of the suit, I shall say nothing farther upon it at present.

My Lords,—The result of these proceedings is, that here we have an appeal from two interlocutors of my Lord Pitmilley, and from two interlocutors of the Court of Session in the Second Division, upon a dry technical point of Scotch law, which is very ably stated in the papers upon your Lordships' table, and was argued with the very greatest ability at the Bar of this House.

My Lords,—It seems to be universally held as the law of Scotland, that where a land estate is settled upon a parent in liferent, and upon his children nascituri in fee, the fee must of necessity be in the former; a necessity said to arise from this notion or from this principle, that a fee cannot be in pendente, although it appears to be admitted that, if the right of liferent be qualified by the term 'allenary,' or 'only,' the parents' right would be reduced to that of a liferent, or fiduciary fee.

My Lords,—The question therefore comes to this, whether, in Mrs Campbell's marriage settlement, the context is such as to bring the present case under the same rule? And I confess, when I find so many consecutive judgments of these learned persons in the Court below, and so powerful conviction expressed by them, that an adherence to this doctrine is necessary for the support of land rights in Scotland, your Lordships certainly ought to pause before you give any countenance to an opposite principle.

My Lords,—Since the hearing of this case, I have applied myself with most anxious attention to an examination of all the authorities which have been brought forward upon the present occasion; and although I do find cases (not easy to be distinguished from the present)

May 5. 1825. where the right had been restricted to a bare life-tenent, yet, in a question involving the security of land rights in Scotland, and on which the whole profession of the law in that kingdom appear to feel so strongly, that an adherence to received and established opinions is of such importance to the security of family settlements, and to the peace and quiet of individuals, I dare not say to your Lordships that the interlocutors complained of are not well founded; but while I move that they be affirmed, I feel myself constrained to add, that, under all the circumstances, the appellants were perfectly justified in bringing the matter before this House, and that there is no ground whatever for subjecting them in the costs of the appeal.

Appellants' Authorities.—Carnegie, Nov. 25. 1705, (Dalr. No. 64. p. 82.); Geran, June 4. 1781, (4402.); Grays, Feb. 25. 1773, (4210.); Boyd, June 28. 1774, (3070.); Turnbull, July 28. 1778, (4248.); Newlands, July 9. 1794, (Bell's Cases, 54. and 4294.); M'Intosh, Jan. 28. 1812, (F. C.)

Respondents' Authorities.—Thomson, Feb. 4. 1681, (4258.); Veitch, July 9. 1630, (4256.); Wemyss, Feb. 10. 1672, (4257.); Creditors of Pringle, June 2. 1714, (4261.); Frog, Nov. 25. 1733, (4262.); Lilly, Feb. 24. 1741, (4267.); Douglas, July 7. 1761, (4269.); Cuthbertson, March 1. 1781, (4279.); Lindsay, Dec. 9. 1807, (No. 1. App. Flar).

M'DOUGAL and CALLENDER—J. RICHARDSON,—Solicitors.

No. 20.

JAMES REID, Appellant.

ROBERT HOPE and Others, (Hope's Trustees), Respondents.

Compensation—Legacy—Proof.—A party having brought an action for payment of a legacy, and compensation being pleaded on an illiquid debt;—Held, (reversing the judgment of the Court of Session), That there was not satisfactory evidence of the debt on which the compensation was founded.

May 6. 1825.

1st DIVISION.
Lord Alloway.

THE appellant, James Reid, nephew of Robert Hope in Newton, became bankrupt, and his estates were sequestrated in 1807 on his own application, with concurrence of his uncle, who was a creditor for £.544. 10s. He settled with his creditors by a composition of 3s. per pound, for which his uncle became cautioner to the extent of 2s. 6d. per pound. Subsequent to this discharge, his uncle executed a deed of settlement, by which he conveyed his whole effects to the respondents, as trustees and residuary legatees, subject to the payment of various legacies. Among others, there was one in these terms:—‘To each of James (the appellant) and Charles Reid, my

' nephews, and children procured of the marriage between this May 6. 1825:
' deceased William Reid and Mary Hope, my sister, the sum of
' L. 600; and in bequeathing another legacy to another nephew,
he stated, that it was to be 'in addition to the money he has
' already received from me;' but there was no such declaration
relative to the legacy bequeathed to the appellant. All the
legacies were declared to be payable at, and to bear interest from
a year after the day of his death. He died on the 23d of
December 1846, and on opening his repositories there was found,
tied up with his papers, the following document, in his own
hand-writing, but subscribed by the appellant:—' Newton, 22d
' May 1809.—Having settled accounts, of this date, betwixt
' Robert Hope in Newton, and James Reid in Druid of Old
' Fasklee in Perthshire; and he is owing to me, Robert Hope,
' L. 557. 7s. 5½d. JAMES REID.' On the back there was writ-
ten by Hope these words:—' Settled account betwixt James
' Reid and Hope, L. 557. 7s. 5½d.' This document had evidently
formed part of a larger piece of paper, the top part of which
had been cut away; but it was alleged by the respondents, that
it was so mutilated when found in the repositories.

For payment of the legacy so bequeathed to him, the appel-
lant brought an action against the respondents, as trustees of his
uncle. In defence, they founded upon the above document, and
pleaded compensation upon the sum there mentioned, with the
subsequent interest, which exceeded the L. 600 bequeathed to
the appellant.

In explanation of the document, the appellant stated, that
after he had been discharged, his uncle being desirous to have a
note of the sums which he had advanced to him, made out an
account, and got the appellant to subscribe it; but that it was
not his uncle's intention to keep up the debt against him, which
indeed had been discharged, and that he had satisfied him for
a part of the composition subsequently paid by him, by deliver-
ing to him a valuable horse. But independent of this explanation,
he pleaded in point of law,—

1. That as the document was not probative in terms of the
statute 1681, c. 5., and was not of the nature of a privileged writ,
it could not be received as legal evidence of the existence of a
debt.

2. That besides, as it was ex facie mutilated—there being only
a part of it produced—it could bear no faith in law, and that it
was not a sufficient answer to say, that he admitted his signature,

May 6. 1825. the more especially as that admission was qualified with the denial of the existence of the debt.

3. That there was no evidence that it was the intention of his uncle that the legacy of L.600 should be imputed in extinction of any debt which might be due to him, and that the presumption rather was, that he meant to bequeath it purely to the appellant.

On the other hand, it was contended by the respondents,—

1. That the document was of a nature which did not require to be tested in terms of the statute, and that as the appellant admitted his signature, it was good evidence of a debt being due by him.

2. That as the acknowledgment was in itself entire, and the document was found in the repositories in the state in which it still was, and as the appellant did not pretend that it had been qualified by any counter declaration, it was effectual against him. And,—

3. That as it was dated subsequent to the discharge under the sequestration, and acknowledged the existence of a debt; and as the amount of it corresponded nearly with the legacy, the presumption was, that as the legacy was bequeathed posterior to its date, it was intended to extinguish the debt; and, at all events, they were entitled to plead compensation.

The Lord Ordinary, ‘in respect the subscription of the pursuer to the document No. 3. of process is not denied, appointed the pursuer to give in a condescendence of the facts he alleges and offers to instruct with regard to the account to which the said document relates.’

On advising that condescendence, with answers, his Lordship found, ‘that the legacy pursued for is compensated by the pursuer’s acknowledgment of the balance due upon settling accounts with Mr Hope on the 22d May 1809;’ and therefore assolizied the respondents.

Against this judgment the appellant lodged a representation, on advising which, with answers, his Lordship issued this note:—‘The Lord Ordinary thinks that this case is attended with difficulty. The pursuer’s debt to Mr Hope, at the period of his sequestration, which is ascertained by the amount for which he was ranked in 1807, so nearly corresponds with the amount contained in the document founded on, that there is the greatest presumption it is the same debt, and that Mr Hope had made out that note merely to shew the amount of the sum he had lost by the pursuer.’

May 6. 1825.

‘ 2d, If this could be believed, it is impossible to think that Mr Hope intended to do his nephew such injustice as to claim full payment to himself, when he had accepted of 3s. per pound, and a full settlement had been obtained with all the creditors upon that footing.

‘ 3d, This document being also dated about fifteen months prior to the settlement, if Mr Hope had intended that the legacy should have been compensated with that debt, he hardly could have failed to have mentioned it, or to have put it in the form of a *legatum liberatorium*; and his not having mentioned it at all, the Lord Ordinary thinks, rather affords a presumption, that he had never intended that jotting to interfere with the payment of that legacy.

‘ 4th. It is an objection that the jotting is not probative: Upon looking at the jotting, it appears that there has been some writing or account above what remains. The Lord Ordinary wishes to know, whether there is any account in Mr Hope’s books relating to this debt, or any notice taken of the account betwixt these parties, and whether the debt rests solely upon that jotting?

‘ The defenders’ construction of the latter cases, the Lord Ordinary conceives to be sound; but these cases all proceeded on the ground, that matters were not entire, and that no party was entitled to deceive another who had clearly acted upon the faith of the missive by means of which the transactions alluded to had been accomplished; but *quomodo constat*, that Mr Hope had been deceived by that informal missive, or that he had been induced to grant the present legacy in consequence of it. The Lord Ordinary wishes to hear Counsel upon the points above stated.

Thereafter, on hearing parties, his Lordship, for the reasons stated in the above note, recalled his interlocutor, and decerned in terms of the libel.

The respondents then represented; and a letter from Mr Hope, restricting his debt claimed under the sequestration to the composition, having been produced, his Lordship pronounced this interlocutor:—‘ In respect that the debt due to the late Mr Hope previous to James Reid’s sequestration was discharged, and Mr Hope’s claim upon that debt was limited by his own letter of 27th May 1807 produced, and by the discharge to Reid upon the composition to 3s. per pound, his executors can only claim compensation upon the amount of that composition, and upon any advances made by Mr Hope to Mr Reid after

May 6. 1809. 'the period of his discharge; and allowed an account of the sum claimed in compensation in this view to be lodged.'

Against this interlocutor the respondents presented a petition to the Court, who, on advising it, with answers, adhered. A second reclaiming petition was then presented, accompanied by various letters and accounts, with a view to instruct the existence of a debt of the amount alleged; and the Court thereafter remitted to an accountant to report, 'whether the balance specified in the pursuer's writing of 22d May 1809 arose from debts contracted before, or from debts contracted after, the discharge in the pursuer's sequestration.'

The accountant having reported, that, from the books of the trustee under the sequestration, from letters both from him and the law-agent, and other documents, he was of opinion that the debt had been contracted subsequent to the discharge, the Court altered the interlocutors complained of, and assolized the respondents; and to this interlocutor they adhered on the 17th Jan. 1823.*

Reid then appealed; and, besides the pleas formerly maintained, he contended, that as the evidence relied on by the accountant, and to which the Court had given effect, consisted of the writings of third parties, they could not be available against him; and therefore the question came to be, whether the document of 22d May 1809 was effectual to establish the debt.

On the other hand, the respondents maintained, that it was competent to refer to that evidence, to shew whether the debt there acknowledged had been contracted prior or subsequent to the discharge; and that, as it was proved that it had been incurred subsequent to it, they were entitled to be assolized.

The House of Lords ordered and adjudged, 'that the interlocutors, so far as complained of, be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, to repel the defences, and to decern.'

LORD GIFFORD.—My Lords, There is another case which stands for your Lordships' judgment, which is certainly attended with some difficulty and complication. The appeal arises out of an action brought by the present appellant, Reid, against the respondents, who are the executors and trustees of a person of the name of Robert Hope, to recover from them a legacy which had been left to the appellant of

* 2. Shaw and Dunlop, No. 384.

May 6. 1825.

L.600. Of the fact of that bequest there is no question at all. The defence made to this demand, was a plea of compensation, founded upon a document, which, they alleged, proved that the appellant stood indebted to the testator in a sum more than equal to the legacy bequeathed to him. They did not dispute this legacy; but they stated, that they were ready to prove that this legacy was one that was compensated by the appellant's debt to the testator—that appeared from a settlement of accounts which had taken place between them in May 1809; that the pursuer at that time owed Mr Hope L. 557. 7s. 5½d. and that no part of it was ever paid; that this, with interest, exceeded the amount of the legacy, and that the suit ought therefore to be dismissed. They founded this defence on a document discovered in Mr Hope's possession after his death, which was dated the 22d May 1809, and which was in these words:—‘ Having settled accounts of this date, betwixt Robert Hope in Newton and James Reid in Druid of Faakalie in Perthshire, and he is owing me, Robert Hope, L. 557. 7s. 5½d. (Signed) JAMES REID.’ My Lords, this document was a piece of paper which was produced at the hearing, which was evidently part of a larger paper, and on which larger piece of paper there had been some writing; and it was stated on the part of the appellant, that that other writing was an account which had been drawn out at that time, and which, it was insisted, related to a transaction between him, and him only, respecting a sequestration of his effects in the year 1807; and that, therefore, it was not entitled to the effect attempted to be given to it at the Bar.

My Lords,—The Lord Ordinary, when the case first came before him, pronounced an interlocutor, by which he found, that the legacy pursued for is compensated by the pursuer's acknowledgment of the balance due upon settling accounts with Mr Hope on the 22d May 1809; therefore assoilzied the defenders from this action, and decerned. In consequence of a representation having been lodged for the appellant, which was followed by answers, the Lord Ordinary pronounced another interlocutor on the 16th November 1819, in these terms:— ‘ The Lord Ordinary having considered the representation, and answers thereto, and whole process, appoints the case to be enrolled, and the respondents to be then ready to state, whether there are any entries whatever in Mr Hope's books relating to the debt alleged to be due by the pursuer, and if there are any accounts whatever betwixt the parties entered in Mr Hope's books; and appoints parties to be then heard on the merits of the case.’ And then there is a note stating this: ‘ The Lord Ordinary thinks that this case is attended with difficulty. The pursuer's debt to Mr Hope at the period of his sequestration, which is ascertained by the amount for which he was ranked in 1807, so nearly corresponds with the amount contained in the document founded on, that there is the greatest presumption it is the same debt, and that Mr Hope had made out that note merely to shew the

May 6. 1825. ' amount of the sum he had lost by the pursuer.' Then he went on with various other observations.

On the 29th of February 1820, the Lord Ordinary pronounced another interlocutor: he then altered the former interlocutors altogether, and decerned in terms of the libel; he recalled his interlocutor of 22d June 1819, and pronounced that I am stating to your Lordships. The respondents submitted that judgment to review in a representation, along with which they produced a list of debts holograph of the testator, and titled upon the top ' An account of cash owing Robert Hope, ' August 1810,' to the amount stated in this document. My Lords, the representation having been advised with answers, the Lord Ordinary, on the 6th June 1820, pronounced this interlocutor: ' The Lord ' Ordinary having considered this representation, with the answers ' thereto, together with the whole process, In respect that the debt ' due to the late Mr Hope, previous to James Reid's sequestration, ' was discharged, and Mr Hope's claim upon that debt was limited, by ' his own letter of 27th May 1807, produced, and by the discharge to ' Reid upon the composition, to 3s. per pound, his executor can only ' claim compensation upon the amount of that composition, and upon ' any advances made by Mr Hope to Mr Reid after the period of his ' discharge; and allows an account of the sum claimed in compensation ' in this view to be lodged.' So that he then took a middle course:— he did not think that the case had been made out for compensation in toto; but he thought, that Mr Hope himself being a creditor under that sequestration, was entitled still to be considered a creditor to the amount of 3s. in the pound, and then he permitted evidence to be given of any advances made by Mr Hope to Mr Reid after the period of his discharge.

My Lords,—That judgment was not satisfactory, and it was brought before the First Division of the Court of Session; and by their first interlocutor they adhered to the Lord Ordinary's interlocutor recalled against, but found the petitioners not liable in the expenses of process. Afterwards, however, on the 13th of June 1821, upon resuming consideration of these matters, in consequence of the proceedings which had in the mean time taken place, the respondents having stated, that they had recovered a document by which they could shew satisfactorily that this debt was still justly due, and some decisive and important evidence as to the advances made by Mr Hope for the pursuer after the sequestration, the Court of Session pronounced this interlocutor:—' The Lords having resumed consideration of this petition, and advised the same with answers thereto, they, before answer, remit to Mr John Stuart, accountant, to examine the whole ' writs, vouchers, and documents in process, and the relative pleadings ' of the parties, and report his opinion to the Court, whether the ' balance specified in the pursuer's writing of 22d May 1809, arose ' from debts contracted before, or from debts contracted after, the discharge in the pursuer's sequestration; authorize and empower the said

'accountant to take the pursuer's declaration with regard to all particulars pertinent to the matters at issue between the parties; and to call on both parties for all proper explanations, and also to call on both parties for all such farther writings and documents as he shall judge material for enabling him to frame his report.'

May 6. 1825.

My Lords,—In consequence of that it was referred to an accountant, who has produced certainly a most elaborate report, which, I should state to your Lordships, appears to me to be a report not merely on the state of the accounts, but on the state of the law, and the propriety of these demands on the one side, and the counter-claims on the other: however, his judgment finally was, that though he could not make the sum stated in this paper, namely, L. 557. 7s. 5½d., he could make up a sum altogether satisfactory to himself, in which there was indebted to Mr Hope L. 454. 8s. 9½d. That, your Lordships will perceive, is L. 102. 16s. 8d. less than the L. 557. 7s. 5½d.; and he says, that instead of the debt, most probably stated on just grounds in the memorandum as L. 557. 7s. 5½d., it may be sufficient to bring forward the principal sum for which sufficient documents have been found, amounting to L. 454. 8s. 9½d.; and then he submits to the Court, that having made out L. 454. 8s. 9½d., that, with the interest upon it for ten years, comes to much more than L. 600, namely, L. 662. 13s. 9½d. which exceeded the L. 600; and the Court, before whom this report was brought, being of opinion that it was satisfactorily made out that there was this sum due from the appellant, altered the interlocutor reclaimed against, sustained the defences for the defenders, assoilzied them from the conclusions of the actions against them, and decerned; and against that interlocutor the present appeal is brought.

I think it must appear to your Lordships, from what I have stated, that it is evident the Court of Session, and the Lord Ordinary after his first interlocutor, were of opinion that the document referred to entitled the respondents to claim, as against the appellant, the amount stated. A question was raised as to the nature of some of the sums, it being alleged that Mr Hope was very kind to his nephew; and another question raised upon that document referred to was, whether it did not relate to transactions before his discharge in the sequestration? The Court referred it to the accountant to inquire whether this balance, specified in the pursuer's writing of the 22d May 1809, arose from debts contracted after the discharge in the pursuer's sequestration. So far from confining himself to that, as I have stated to your Lordships, he has gone into a most elaborate discussion of the whole question, and has reasoned very ably upon the probabilities of the case, and concerning the documents produced before him—extracts from letters, written not by Mr Hope the deceased, or by the appellant, but from the very proceedings under the sequestration—correspondence between the trustees under the sequestration with Mr Hope, and also letters written by the trustees to another person, and other documents,—he has endeavoured to make out, that those sums, amounting to

May 6. 1825. L. 454. 8s. 9½d. had been advanced by Mr Hope for the benefit of his nephew, and advanced, not as a gift from him to the nephew, but as a loan, for which the nephew was ultimately responsible.

I have observed to your Lordships, that the interlocutor of the Court of Session confined him in his inquiries to the period of the discharge in the pursuer's sequestration. Now, certainly, with respect to the first sum in this account, L. 235 and a fraction, although it was after the sequestration had issued, yet the advance was before the discharge in the sequestration; that was not till October 1807, and this supposed advance was not till the month of March and April preceding. I mention that only to shew, that the accountant (and as his report has been confirmed by the decision of the Court of Session, I suppose they thought he was right in so considering) thought he was entitled to go into the whole of the period from the sequestration, without confining to the period of the discharge; and therefore, taking that in as the period, he has gone into all this evidence to shew that there was this sum due.

My Lords,—I have stated to your Lordships it is not my intention to go minutely through the different sums stated here. The way in which this debt is attempted to be fixed upon the appellant is, as I have stated to your Lordships, through the medium of a written document, dated the 22d of May 1809. It appears, that after the sequestration was issued, the sum of L. 235 was wanted in order to discharge certain bygone rents, and the expenses of the sequestration; but how it appears that that sum was afterwards paid by Mr Hope, or how it was paid, I must confess, looking at this evidence as a Judge, I cannot obtain satisfaction. What my suspicions upon the subject may be, it is unnecessary for me to state; but really the question in this case is, whether, upon the evidence before the accountant, there is sufficient proof to satisfy a Judge judicially, that a debt to this amount was contracted by the appellant to the deceased Mr Hope? My Lords, there is no account whatever produced, no settled account produced, nor any statement of accounts, by which it can be shewn that that advance was made by Mr Hope, or even acknowledged to have been made on his part; and the same observation applies with respect to the sum of L. 86. 6s. which is made up of certain sums alleged to have been remitted to the trustee, for paying the composition on the 4th of December 1807. This appears in an account kept by Mr Laing, who was employed in the business relative to the pursuer's sequestration and composition, in which he says,—‘Charges for business relating to the pursuer's sequestration and composition, from 7th February 1807 to 18th March 1808, L. 51. 9s. 8d.; Remittance made by him to the trustee, for paying the composition, 4th December 1807, L. 86. 6s. 1½d.;—making altogether, on Reid's account, L. 137. 15s. 3½d. against this appellant,—that these sums were advanced by Mr Hope on his account, and that constitutes a debt against him. Now it appears, that when this sequestration was entered into, this old gentleman was cau-

tioner for his nephew for the composition; and it is stated, that he afterwards gave him a discharge for the amount he had paid, receiving from him certain effects. There is no account whatever, certainly, on either side, of the amount and value of the effects; therefore, whether Mr Hope was indemnified by those effects, or whether he advanced this money out of his own pocket, does not appear. May 6. 1825.

My Lords,—I must confess I look at this case with great anxiety, particularly after the fluctuating decisions of the Court below; at one time deciding adverse to the appellant, at another time again deciding in his favour, and then a middle course having been taken. But then, when I see that the Court of Session were of opinion, as appears from their instructions to the accountant, that it must be made out before your Lordships that those advances had been made by Mr Hope after the period of the discharge in the sequestration, it comes at last to this, whether, looking at the accountant's report, and examining the evidence which he has stated in that report, you can be judicially satisfied that a debt, to the amount of L. 600, or to any amount, has been constituted by regular, decisive and proper evidence, against the appellant. My Lords, as I have said before, whatever my suspicions may be upon that subject, considering the situation of Mr Hope and the parties; yet, at the same time, the question I have put to myself on looking over this evidence—which I have done several times since I had the honour of hearing this case, and which I have examined the more anxiously when I found that evidence was satisfactory to the Court of Session—is, Whether, looking at this evidence, I can conscientiously say, that it satisfies me judicially that there is that clear decisive evidence given before the accountant, by which a debt has been constituted on the part of Mr Hope against the appellant Mr Reid?

My Lords,—I cannot say that it does. I will not go into the question, which was very ably argued at your Lordships' Bar, What degree of evidence would be sufficient to sustain the claim of composition? But it was agreed on all hands, that to establish a debt in a cross action, (if I may use the expression), the clearest evidence was requisite with respect to the compensation. It appears not to be a plea very much favoured by the Courts in Scotland, and Mr Erskine (S. 4. 16.) says, 'Compensation is not regularly receivable where the debts upon both sides are not clear beyond dispute; they must be ascertained either by a written obligation, the oath of the adverse party, or the sentence of a Judge. Though the foresaid Act 1592 requires that all grounds of compensation be instantly verified, yet, by our uniform practice for near a century, which seems grounded on the Roman law, if a debtor in a liquid sum shall plead compensation upon a debt due by his creditor to him, which requires only a short discussion to constitute it, sentence is delayed ex æquitate against the debtor in the clear debt, that he may have an opportunity of making good his ground of compensation, according to the rule, "Quod statim liquidare potest pro

May 6. 1825. 'jam liquido habetur.'" However, my Lords, as I have stated to your Lordships in this case, I do not at all enter into the question, whether this is that sort of debt constituted in detail, which would be available by way of compensation; for I think the parties must, by inquiry before the accountant, and by the proceedings in the cause, be considered as having admitted this would be a debt, which would be proper matter of consideration in that character, if proved. But then, the question presents itself, Whether this debt is actually so proved? and I say upon that, I am to look at this case as if it were an action brought by the respondents, the representatives of Mr Hope, against the appellant, Mr Reid, for this, as a debt due to him. And can I, looking at it in that view, say, that this evidence satisfies my mind that such a debt was due? It is only necessary to refer your Lordships to the accountant's report, to shew the difficulties of the case. He there states, that the facts of the case appeared to be involved, and to require considerable pains in coming to an explanation, particularly in consequence of the death of the principal party, and other circumstances to which he adverts. It is sufficient to state, that the accountant laboured under very great difficulty; at the same time, he at last came to a result satisfactory to himself. As to this sum of L. 454, he says that is proved most satisfactorily, and that that, with the interest, would carry the debt due from the appellant beyond the amount of the legacy. As I have already stated to your Lordships, after a most anxious consideration of this case, I cannot come satisfactorily to that conclusion; and, if the case be doubtful, then I apprehend that the appellant is entitled to his legacy. The case, if stated at the highest, I think, cannot but be considered to rest on very doubtful evidence; and therefore, after a very anxious, and, at the same time, I have no hesitation in saying, a very painful consideration of this case, where I find my opinion opposed to that of the Court of Session—(but I apprehend I am bound to state to your Lordships what my opinion is upon the whole of the case); that opinion being, that these interlocutors ought to be reversed, and that there ought to be a judgment in favour of the appellant—I am compelled to move your Lordships that the judgment be reversed.

Appellants' Authorities.—(1.)—1681, ch. 5.; and cases in Morr. Dict. 17,022, 17,026, 17,029; 3. Ersk. 2. 24.—(2.)—4. Stair, 22. 10.; 3. Ersk. 2. 20.; Murchie, July 1. 1796, (1458.); Merry, Feb. 6. 1801, (No. 13. App. Writ); Bryce, Nov. 16. 1810, (F. C.)

Respondents' Authorities.—(1.)—Crawford, Dec. 16. 1739, (16,979.); Foggo, Dec. 20. 1746, (16,979.); Neil, June 8. 1748, (10,406.); Brown, Nov. 28. 1794, (17,058.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

The Right Honourable THOMAS GEORGE LYON BOWES, Lord No. 21.
GLAMMIS, Appellant.

Sir JOHN D. PAUL and Others, Earl of STRATHMORE's Trustees,
Respondents.

Aliment.—A nobleman having left his estates to his eldest son, and a provision of L. 12,000 to his second son; and the eldest having made an entail, excluding his brother from the estates, but calling his son as institute; and conveyed the estates to trustees, to be held for a number of years, so as to exclude his brother's son from the enjoyment of them during that period; and on his death, his brother's son having made up titles under the entail, subject to the burden of the trust; and the trustees having been infeft; and he having an income by his wife of L. 500 per annum;—Held, (affirming the judgment of the Court of Session), That he had no claim against the trustees for aliment, either under the Act 1491, as representing his grandfather, or on any other ground.

In 1776 the Earl of Strathmore died, possessed of extensive estates, leaving two sons, John, (who succeeded to him as Earl of Strathmore), and Thomas, to whom he left L. 12,000. Earl John made up titles to the estates in fee-simple, and during his minority they were greatly enlarged. His brother, Thomas, married and had a son, the appellant, who was born on the 5th of February 1801.

May 6. 1825.

1ST DIVISION.
Lord Gillies.

In 1815 Earl John executed three deeds unico contextu—an entail of his estates, a trust-disposition, and a deed of nomination of heirs. By the entail he disposed the lands to himself, 'and the heirs-male lawfully to be procreated of my body, successively in order, according to their seniority, and the heirs-male respectively to be procreated of their bodies successively; whom failing, to my other heirs after-written.' He then granted a procuratory for resigning the lands to them, 'whom failing, to any person or persons to be named by me, in any nomination or other writing to be executed by me at any time of my life; and failing such nomination, and of the person or persons to be therein named, and their heirs, then to the persons having right for the time to the titles, dignities, and honours of Earl of Strathmore and Kinghorn,' &c. By this deed he empowered the heirs in possession of the estate 'to provide and infeft their lawful wives and husbands, and the wives of their eldest son or grandson, &c. in liferent annuities during their lifetimes, and in lieu of terce and courtesy;' and declared, 'that the heir succeeding should be holden and obliged to obtain himself timeously entered with the superiors of the said lands and estate,

May 6. 1825. 'and infest and seized therein,' and that action should be competent against him to compel him so to do.

The relative deed of nomination proceeded on the narrative of the entail, and of the trust-disposition, 'whereby, in the event of my death without heirs of my body, the same will be vested in trustees for the uses and puposes therein specified;' and on the farther narrative, 'that the right of the said trustees would be preferable to, and exclude all the heirs of entail herein after named and appointed, other than and except the heirs of my own body: and being resolved to exclude the honourable Thomas Bowes, my only surviving brother-german, and John Lyon of Hetten-House, and Charles Lyon, his brother, from ever succeeding to my said estates,' he declared and appointed, 'that in case of the failure of heirs whatsoever of my body, and the heirs of their bodies, my said lands and estates shall devolve and belong to the heirs-male lawfully procreated, or to be procreated, of the body of the said Thomas Bowes, successively in their order;' whom failing, a series of other heirs, but excluding always the said Thomas Bowes; John Lyon, and Charles Lyon; and he farther declared, 'that the said disposition and entail executed by me, of the date hereof, is granted, and shall be accepted by the heirs of entail hereby appointed to succeed to my said lands and estates, failing heirs of my own body, with and under the burden of the foresaid trust-disposition,' &c.

By the trust-deed, which narrated the entail and deed of nomination, as containing a provision 'that the said disposition and entail should be accepted by my said heirs of tailzie, thereby appointed to succeed to my said lands and estate failing heirs of my own body, with and under the burden of the trust-disposition after-written,' he conveyed his whole estates to the respondents in fee; but that in trust for various purposes, and, in particular, for uplifting the rents and produce of his estates, and applying the same to the purchase of lands to be annexed to his estates, and entailed in the same manner; declaring, 'that this trust shall subsist till all the debts, legacies, donations, and others payable out of my Scotch estate as aforesaid, shall be paid and extinguished, and for the space of 30 years from the day of my death, and until the death of the longest liver and survivor of the said Thomas Bowes, my brother, and of John Lyon and Charles Lyon; and immediately after the expiry of 30 years from the day of my death, and after the death of the longest liver or survivor of the said Thomas Bowes, John Lyon, and

‘ Charles Lyon, and whenever the said debts, legacies, dona-
 ‘ tions, and others shall have been paid as aforesaid, this present
 ‘ trust shall fall and become extinct.’ He also provided, ‘ that
 ‘ in case the said Thomas Bowes shall die, leaving a child or
 ‘ children succeeding to my title and dignity of Earl of Strath-
 ‘ more and Kinghorn, and having right to succeed to the said
 ‘ estates as heir of entail therein, my said trustees may, after the
 ‘ expiry of 30 years from the day of my death,’ convey and
 ‘ make over his estates to such child or children, although John
 ‘ and Charles Lyon should be alive, but who should always be
 ‘ excluded from the estates; and, in the event of their succeeding
 ‘ to the titles, should be allowed L.2000 a-year. May 6. 1825.

The Earl died on the 3d of July 1820, and was succeeded in his titles by his brother Thomas, whose son, the appellant, then became Lord Glamis, and as such had right to the estates under the destination in the entail. In virtue of it he made up titles, but under the burden of the trust, and was infeft; and the trustees likewise made up titles under, and in terms of, the trust-disposition.

By the effect of the above deeds, Thomas Earl of Strathmore, and the appellant, were entirely excluded from the enjoyment of the estates. The appellant, by his marriage with an English lady, acquired right to a property yielding an income of L.500 per annum, which he alleged was the only source of support which he had. He then brought an action against the trustees, stating, ‘ that by the law of nature, as well as by the laws and
 ‘ practice of Scotland, some fair proportion of the rents of the
 ‘ estates foresaid, that are destined to and vested in manner fore-
 ‘ said, should be allotted and set apart for his maintenance and
 ‘ support, and that of his family, corresponding in some measure
 ‘ to the rental of the estates, and to their rank and station in life;
 ‘ so that he and they, with such large prospects of future wealth,
 ‘ may not in the mean time be left destitute and exposed to
 ‘ necessities and want;’ and therefore concluded for payment of an aliment of L.3000 a-year, or such other sum as might be modified out of the rents of the estates.

In support of this demand he maintained,—

1. That as he was the fiar of the estates, and was only excluded by the trust from the power of drawing the rents, the parties stood precisely in the relative characters of fiar and liferenter of the estates; or that at least, if the respondents held a fee, it was of a subordinate nature, and merely to the effect of uplifting the rents; so that there was no substantial distinction between this case and

May 6. 1823. those in which aliment had been awarded under the statute 1491, c. 25.

2. That upon general principles of justice and expediency, independent of the statute, a party in the situation of the appellant was entitled to an aliment from those who drew the rents of his estates; and that at all events, by combining these principles with the provisions of the statute, he had an undoubted claim against them.

3. That as the respondents represented the late Earl of Strathmore, who again represented his father, who was the appellant's grandfather; and as he, if alive, would have been bound to have alimented him, seeing that his own father was unable to do so, that obligation had descended upon the respondents. And,

4. That although it was true that he had an income of L.500, yet, in judging of a question of aliment, that circumstance could not affect the question of right, but only the amount to be awarded; and that, in order to ascertain that amount, the case must be considered as if he enjoyed no such income; and then, on the amount being ascertained to which he was in law entitled, a deduction corresponding to his income might be made, and decree pronounced for the difference; and that the circumstance of his being major could not invalidate his right to aliment.

On the other hand the respondents contended,—

1. That as the decisions pronounced under the Act 1491 plainly went beyond the enactment of it, the Court could not be warranted by these decisions in extending the statute to cases for which there was no such authority: That the statute had been confined to the case of a proper *fiar* and *liferenter*, whereas the respondents were not *liferenters*, but were vested in the fee as trustees; and that, according to the doctrine of the appellant, a debtor might contend that he had right to aliment from his creditor, who was uplifting the rents in virtue of an heritable bond and disposition in security, since the debtor, who was the *fiar*, was excluded from the rents.

2. That there was no authority for maintaining that a claim of aliment lay against a party, on general principles of justice and expediency, or by combining them with the statute 1491.

3. That there was no claim on the footing of representation, as the appellant was not alive at the death of his grandfather, and as his own father had received a suitable provision; and that, if such a principle were admitted, any person who could trace his descent from the most remote ancestor, would be en-

titled, at the distance of centuries, to claim aliment from his heir. May 6. 1825.

And, 4. That as the appellant enjoyed an income of L.550 per annum, and as aliment was only due on a principle of necessity, all claim for it in this case was entirely excluded.

The Court, on the report of the Lord Ordinary, and after a hearing in presence, and advising mutual memorials, on the 1st February 1823, sustained the defences, and assoilzied the respondents.*

The Judges were unanimously of opinion, that the statute 1491 was inapplicable, and that the other circumstances of the case excluded any claim for aliment.

Lord Glammis having appealed, the House of Lords, after hearing the Counsel for the appellant, 'ordered and adjudged, 'that the appeal be dismissed, and the interlocutor complained 'of affirmed.'

LORD GIFFORD.—My Lords, In this case I am bound to state to your Lordships, that after attentively considering the interlocutors complained of, it does not appear to me that there are any grounds whatever for altering the decision of the Court of Session. It does not appear to me that Lord Glammis has made out, in point of law, any claim whatever for the aliment which he seeks, against the trustees under the settlement which was executed on the 15th December 1815 by Lord Strathmore.

My Lords,—This claim, if it can be supported at all, can be supported only on the equity of the statute to which reference has been made. I am not one at all inclined to extend the equity of that statute, but it is sufficient for me to say, looking at that statute and the facts of the case, that the appellant has failed in making out his claim to call upon the trustees, as representing his grandfather; and therefore it does not appear to me that it is necessary, in this case, to call upon the Counsel for the respondents to support the decision of the Court of Session. I therefore humbly propose to your Lordships that this interlocutor be affirmed.

Appellant's Authorities.—1491, ch. 25; 2. Craig, 355; Whitford, 1619, (386.); Hamilton, Feb. 7. 1682, (387.); Eaton, July 25. 1805, (390.); Kirkland, Nov. 27. 1685, (403.); Cunningham, July 12. 1715, (405.); Ford, Feb. 1722, (396.); Balfour, 237.; M'Kenzie, Obs. Stat. 1491, ch. 25; 2. Ersk. 9. 62.; Reid, March 5. 1813; Dabiel, Dec. 4. 1788, (450.); Clark, Feb. 19. 1790, (No. 2. App. Aliment); Netherby, Jan. 24. 1663, (419.); Thomson, July 23. 1778, (422.); Seaton, Feb. 11. 1764, (451.); Lowther, Dec. 15. 1786, (435.); Tait, Feb. 28. 1802, (No. 3. App. Aliment); De Courcey, July 3. 1806, (No. 12. App. Aliment.)

* See 2. Shaw and Dunlop, No. 206.

Respondents' Authorities.—*Mirrie*, July 17. 1731, (397.); *Stuart*, June 24. 1760, (398.); *Speid*, June 14. 1806, (F. C.); *Reid*, March 10. 1809, (F. C.)

ALISTON and HUNDEBIE—SPOTTISWOODE and ROBERTSON,—
Solicitors.

No. 22. THOMAS WATSON and Others, Trustees of JAMES STORMONTH,
Appellants.

Mrs STORMONTH OR DARLING, Respondent.

Husband and Wife—Trustee.—A husband and wife, along with other parties, having been named trustees under a deed of settlement;—*Held*, (affirming the judgment of the Court of Session), That the wife was entitled to act and vote as a trustee.

May 11. 1825.

2D DIVISION.
Lord Pitmilly.

ON the 17th October 1803, James Stormonth of Lednathy, writer in Edinburgh, executed a trust-deed and settlement, by which he conveyed his estates to ‘James Darling, writer in ‘Kelso, Margaret Stormonth his wife, my niece, Robert Wilson, accountant in Edinburgh, Thomas Watson, farmer at ‘Laurieston, and James Adamson, writer in Edinburgh, my ‘nephew, and to the survivors or survivor of them, in trust,’ and thereafter, by another deed of settlement, executed on the 18th of February 1805, he disposed his estates ‘to the said ‘James Darling, writer in Kelso, Margaret Stormonth his ‘spouse, Robert Wilson, Thomas Watson, and James Adamson, and to the surviving acceptors or surviving acceptor of ‘them, the major part of such surviving acceptors being always ‘a quorum, in trust, for the uses, ends, and purposes after-mentioned.’ These purposes were then enumerated, of which the most material were to entail his estate of Lednathy upon his nephew, James Stormonth Darling, son of Mr Darling, and for selling the rest of his heritable property, of which three-fourth parts of the price were to be paid to the other children of Mr and Mrs Darling, and the remaining fourth to James Adamson, one of the trustees. He also further declared, that the trustees should not be liable for omissions, nor the insolvency of factors, ‘nor shall they be answerable for the intromissions of one ‘another, but each of them allenarly for his or her own actual ‘intromissions.’

After executing three different codicils (which were not material to the present question) Mr Stormonth died in October

1817. Two days thereafter a minute of acceptance was executed by James Darling, James Adamson, and Thomas Watson, as trustees, who were thereafter infest in the property disposed to them in virtue of the trust-disposition. May 11. 1825.

Some disputes having taken place between Mr Darling and Mr Adamson; and Mrs Darling having hitherto been under the impression that she could not lawfully act during the life of her husband, but never having refused to accept, and being advised that this idea was erroneous, she brought an action of declarator in the month of April 1822, to have it found that she 'is entitled to act and vote as a trustee under the said trust-deed and settlement of the said deceased James Stormonth; and that she is entitled to exercise and enjoy all the rights, privileges, and authorities conferred upon the trustees by the said trust-deed and settlement.'

In defence, Adamson and Watson, the two other trustees, contended,—

1. That it had been settled, by a series of decisions, that a married woman could neither be a curator nor a tutor, and that, as she could not effectually incur any personal obligation, it was not competent for her to act as a trustee, in which character she must of necessity incur obligations of a personal nature, which a married woman could not legally do; or that, at all events, her appointment must be superseded until the death of her husband, till which period she was under his curatory.

2. That from the mode in which Mr Stormonth had appointed her a trustee, and particularly by not excluding the *jus mariti* and power of administration of her husband, it was his intention, either that they should have only one vote between them, or that the exercise of her power should, in the meanwhile, be suspended; and that, accordingly, such had been the interpretation which she and her husband had put upon the appointment; and in that view she had never acted. And,

3. That although she was present on the occasion when the other trustees accepted, yet she had not declared her acceptance; and as she had allowed them for nearly five years to act under the trust, on the faith that she had declined to accept, she was not now entitled to insist on exercising the office.

To this it was answered,—

1. That as her husband not only did not object to her acting as a trustee, but expressly sanctioned it; and as it had been found in the case of *Stoddart v. Rutherford*, that a married woman might be lawfully appointed and act as a trustee, and

May 11. 1823. as there was no authority to the contrary, there could be no objection to her appointment.

2. That it was manifest from both the deeds executed by Mr Stormonth, that he was desirous that she should act as a trustee; that accordingly she was expressly named in both of them, and that the chief interest under the trust was bestowed upon her family. And,

3. That she had never declined to accept, but had been led to believe by Adamson (who was a professional person) that she could not lawfully act during the life of her husband; and therefore there was no bar to her now accepting the office, the more especially as she was willing to confirm every thing which had been hitherto done by the trustees.

The Lord Ordinary decerned in terms of the libel, and the Court, on the 25th of November 1823, adhered, 'in respect it has been judicially admitted, that the respondent is ready to confirm all the former actings of the trustees;' and thereafter, on the 14th of January 1824, refused a petition without answers.*

Lord Glenlee was of opinion that nothing had occurred to prevent Mrs Darling from acting; but he had some doubts whether she and her husband were entitled to separate votes.

The Lord Justice-Clerk expressed a similar opinion; but was clear that she was bound to confirm the former acts of the trustees.

Lord Craigie thought that she was entitled both to act and vote as one of the trustees.

Lord Robertson observed, that the case of Stoddart settled the present one, as to a married woman being qualified to act as a trustee; and was of opinion that Mrs Darling was entitled to a vote.

Lord Pitmilley was of the opinion he had formed as Lord Ordinary. The point as to the vote had not been argued before him in the Outer-House, but he was clear it was not well founded.

Watson and Adamson having appealed, the House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

Appellants' Authorities.—1. Ersk. 6. 19.; 1. Stair, 4. 13.; 1. Bank. p. 126.; 1. Ersk. 6. 25.; Watson, Dec. 10. 1772, (5976.); 1. Ersk. 7. 12.; 1. Stair, 6. 24.; 1. Bank. p. 178.; 1. Ersk. 7. 29.

Respondent's Authorities.—Stoddart, June 30. 1812, (F. C.); Bell, March 10. 1794, (16,374.); Campbell, July 6. 1827, (16,246.)

SPOTTISWOODE and ROBERTSON—MONCREIFF and WEBSTER,—
Solicitors.

WILLIAM GUTHRIE, Appellant.—*L'Amy—Ro. Bell.*

No. 23.

J. CURL, J. DOUGLAS, and CLAUD GIRDWOOD and Company,
Respondents.—*Greenshields.*

Bankrupt—Sequestration—Agent and Client.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That an agent in a sequestration was not entitled, after the bankrupts had been discharged on payment of a composition, and finding security for payment of expenses, to claim the amount of his account from the creditors.

MALCOLM PATERSON and Company, merchants in Glasgow, having become bankrupts, a mandate in the following terms, subscribed by them, by the individual partners, and by Claud Girdwood and Company, creditors to the extent required by law, was transmitted to the appellant, William Guthrie, writer in Edinburgh:—‘October 27. 1820.—We hereby authorize you to apply to the Court of Session for sequestration of the estates, real and personal, of the subscribers, Malcolm Paterson and Company, and individual partners; for doing whereof this shall be your mandate.’ In virtue of this authority, the appellant applied for and obtained a sequestration of the estates, on which Gilbert Sanders, accountant in Glasgow, was afterwards elected and confirmed trustee, and by whom the appellant (who was himself a creditor) was employed as agent in the sequestration. On the 20th of January 1821, the bankrupts offered a composition of 6s. 8d. per pound on the debts due by the Company, and of 6d. per pound on the debts due by Malcolm Paterson as an individual, which offer was entertained by the creditors, who instructed the trustee to call a meeting, for the purpose of finally deciding on it. At the meeting which was held for the purpose, the bankrupts renewed their offer, and proposed Charles M’Kidd, brick-maker in Glasgow, as cautioner, both for payment of the composition and the expenses of the sequestration. To this the creditors present agreed, with the exception of a Mr Kennedy, who declined to accede unless additional security was granted. In consequence of this, and of the extent of Mr Kennedy’s claims, the meeting ‘unani-

May 13. 1825.

1st DIVISION.

May 13. 1825. 'mously instructed the bankrupt, Mr Paterson, to obtain the
'signature of the respective creditors ranked to a minute of ac-
'cession to the said offer; and also to arrange with, and procure
'Mr Kennedy's accedence to the offer; and on this being ob-
'tained, and a regular bond of caution executed, the meeting
'also unanimously authorize the trustee to concur with the bank-
'rupt in an application to the Court, in order that the compo-
'sition may be approved of, and the bankrupt discharged in
'terms of the before recited offer.' All the creditors, with the
exception of Kennedy, subscribed the minute of accession; and
he was also at last persuaded to do so, on receiving additional
security. A report was then made up by the trustee, in which
he represented, that the offer made at the first meeting had
been entertained by all the creditors, with the exception of Ken-
nedy; and without alluding to his non-accession at the second
meeting, he stated, that the bankrupt Paterson had been unani-
mously instructed to get the accession of all the creditors to a
minute of agreement, which had since been obtained. This re-
port was transmitted to the appellant, who, as agent, presented
a petition to the Court, in which nothing was stated as to the
non-accession of Kennedy at either of the meetings, but in which
reference was made to the report of the trustee, and in which it
was prayed, that as the whole creditors had acceded, and the
trustee had given his concurrence, and the requisites of the
statute had been complied with, a discharge, except as to the
payment of the composition, should be granted.

After the usual intimations the bankrupts were discharged;
but soon thereafter the cautioner, M^cKidd, became insolvent,
and Malcolm Paterson and Company, and the individual part-
ners, were again rendered bankrupt, and a sequestration of their
estates awarded.

In the meanwhile, the appellant had repeatedly applied to
Sanders, the trustee, and also to Alexander Ure, the agent at
Glasgow, for payment of his account; and it appeared, that in
liquidation of it a bill was granted to him by the bankrupt,
Paterson, and one Downie, which was guaranteed by Paterson
and Company. When that Company were sequestrated a second
time, Sanders claimed on the estate in virtue of that bill, stating,
that he was the creditor in it by virtue of an indorsation from
the appellant. Thereafter the appellant presented a petition to
the Court of Session, under the Act of Sederunt 6th February
1806, in which he stated, that he had not received payment of
his account, and praying for a remit to the auditor in the usual

May 13. 1825.

terms, and for decree against Sanders, Ure, and the respondents, creditors ranked under the original sequestration. No appearance was made by Sanders or Ure; but the respondents appeared and pleaded,—1. That as it was provided by the 54. Geo. III. c. 137. § 69. that the whole expenses shall be paid or provided for by the bankrupt or his friends before any discharge shall be granted, and as it was the duty of the trustee and his agent to see that this was done, they must be held to have discharged the creditors for any claim on that account, and to have received the parties, who were the obligants in the bond, as their debtors in place of the creditors, who, by the provision of the statute, were to obtain payment without deduction of their composition; and accordingly, if the trustee and his agent had not been satisfied with the arrangement for these expenses, they might have successfully objected to the discharge. 2. That by receiving the bill for payment of the expenses, there was such a novation of the debt as extinguished any claim which the appellant might have had against the creditors, even supposing that the statute had not exempted them from responsibility. 3. That it was proved by the indorsation of the bill to Sanders, that he had paid the amount to the appellant. And, 4. That this action was a collusive attempt to recover payment for Sanders, who, from the irregularity of the proceedings, was not entitled to demand payment himself. By the appellant it was answered,—1. That as he had been employed as the agent of the creditors and under their mandate, and as he had no connexion otherwise with the sequestration, and was not responsible for any irregularities which might have been committed by the trustee, and had laid before the Court the whole information which had been communicated to him, and had never agreed to discharge the creditors from their liability, or to adopt the bankrupt and his cautioner as his debtors, it was impossible to maintain that under the statute he was not entitled to recover. And, 2. That he not only had never agreed to receive the bill in payment of his account, but when sent to him by the trustee, he had rejected it, and had merely put his name upon it to enable him to indemnify himself pro tanto, by claiming on the estates of the granters; that in point of fact he had received no payment; and that it was not true that he was colluding with the trustee. The Court, after allowing a proof by examination of havers, relative to the alleged payment, remitted the case to the auditor quoad Sanders and Ure, but refused the petition with respect to the respon-

May 13. 1825. 'mously instructed the bankrupt, Mr Paterson, to o' Jene
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 his original employer, and as the person primarily liable to him. And
 there was collusion between him and the trustee, in respect that the trustee
 made payment to the appellant of that very account
 endeavouring to recover from the creditors.'

May 20. 1825.

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hurt or invalidate, but shall, on the contrary, cor-
and strengthen the aforesaid decree,' &c.; and, on the
nd, a mutual agreement was made in these terms:—
gning the renunciation by David Drummond to Mr Pit-
rn, it is agreed on by both parties, 1st, That Mr Drummond
shall be allowed to sell his crop and stocking, in his own name,
at or about the term of Lammas for the crop, and Michaelmas
' for the stocking, and allowing a credit to purchasers on secu-
' rity till Candlemas next; but all the bills are to be made pay-
' able directly to Mr Pitcairn, or his factor for his behoof, and
' to be delivered to them in payment of the arrears of rent; for
' which purpose Mr Drummond does hereby expressly assign
' and convey them to Mr Pitcairn, his heirs or successors. 2dly,
' That every obligation incumbent on the tenant, and every ob-
' ligation incumbent on the proprietor, either as constituted by
' the present leases or otherwise, shall, if these parties cannot
' adjust them among themselves, be made the subject of a refe-
' rence to two respectable men, to be mutually chosen, with
' power to them to choose an oversman, in case of difference of

May 13. 1825. dents; and to this interlocutor they adhered on the 6th of June 1823.*

Against these judgments the appellant entered an appeal; but the House of Lords 'ordered and adjudged, that the appeal be 'dismissed, and the interlocutor complained of affirmed, with 'L.100 costs.'

M'DOUGAL and CALLENDAR—A. MUNDELL,—Solicitors.

No. 24.

JOHN PITCAIRN, Appellant.

DAVID DRUMMOND, Respondent.

Submission.—A landlord having obtained and extracted a decree of irritancy of his tenant's lease, in which there was no stipulation as to meliorations; and thereafter entered into a submission with him of 'all claims, questions, disputes, and differences of every kind depending and subsisting betwixt them, upon any account, 'transaction, or occasion whatever, preceding the date hereof;' and the arbiters having found the tenant entitled to a sum for meliorations;—Held, (affirming the judgment of the Court of Session), That he had not exceeded his powers.

May 20. 1825.

1st DIVISION.
Lord Alloway.

By a tack, dated 12th July 1805, Drummond became tenant of the Mains of Pitcairns, the property of the appellant Mr Pitcairn, for 19 years, under which he took possession. By a clause in the tack it was provided, that the tenant should take the houses and fences in the state in which the outgoing tenant should leave them; that the landlord should make a certain

* In the appeal case for the appellant it is stated,—'In pronouncing the interlocutor now submitted to review, the appellant understands the Court to have proceeded upon various grounds:—1. That the appellant had failed in his duty to the creditors, as well as to the Court, by allowing a party to be received as cautioner for the composition who was not able to discharge the debt and the expenses attending the sequestration; and also, for having stated in the petition for approval of the composition, that caution had been found for payment of a composition, and that the expenses had been paid or provided for, when it afterwards turned out that neither of these were the case. 2. That he had forfeited his claim against the creditors in consequence of his having brought the sequestration to a close, by carrying through the bankrupt's discharge, and extracting the decree, without receiving payment of his expenses. 3. That he ought to have brought his action, in the first instance, against the trustee as his original employer, and as the person primarily liable to him. And, 4. That there was collusion between him and the trustee, in respect that the trustee had already, in point of fact, made payment to the appellant of that very account which he is now endeavouring to recover from the creditors.'

May 20. 1825.

allowance to the tenant out of the first three years' rents for putting them into sufficient condition, according to a plan to be laid down by the landlord; that the tenant should pay $7\frac{1}{2}$ per cent on money expended by the landlord in enclosing or building; and that in the event of the bankruptcy of the tenant the lease should expire; but there was no provision for payment of any meliorations which the tenant might make upon the lands.

Drummond having incurred arrears of rent, Pitcairn, in 1810, obtained a warrant of sequestration, and an order upon him to find caution in terms of the Act of Sederunt 14th December 1756; and he having failed to do so, decree was pronounced against him for the arrears, under which he was incarcerated, and at the same time he was decreed to remove. This warrant of removal was not executed; and Drummond having incurred a farther arrear of two years' rents, Pitcairn raised a new action against him, concluding for a declarator of irritancy of the tack, and for a summary removal. On the 26th of February 1812 he obtained a decree to that effect, which was extracted. Thereafter, on the 24th of April, an arrangement was entered into between them, by which, on the one hand, Drummond, in consideration of being allowed to remain in the farm till November, executed a renunciation of the tack; 'but declaring always, that the granting of these presents shall 'in no ways hurt or invalidate, but shall, on the contrary, corroborate and strengthen the aforesaid decree,' &c.; and, on the other hand, a mutual agreement was made in these terms:-- 'At signing the renunciation by David Drummond to Mr Pitcairn, it is agreed on by both parties, 1st, That Mr Drummond 'shall be allowed to sell his crop and stocking, in his own name, 'at or about the term of Lammas for the crop, and Michaelmas 'for the stocking, and allowing a credit to purchasers on security till Candlemas next; but all the bills are to be made payable directly to Mr Pitcairn, or his factor for his behoof, and 'to be delivered to them in payment of the arrears of rent; for 'which purpose Mr Drummond does hereby expressly assign 'and convey them to Mr Pitcairn, his heirs or successors. 2dly, 'That every obligation incumbent on the tenant, and every obligation incumbent on the proprietor, either as constituted by 'the present leases or otherwise, shall, if these parties cannot 'adjust them among themselves, be made the subject of a reference to two respectable men, to be mutually chosen, with 'power to them to choose an overseer, in case of difference of

May 20. 1825. ‘ opinion; and the award of either of the arbiters, or oversman, in their order, shall be obligatory on both parties, and shall be final. 3dly, That these two articles shall regulate the parties, if it be found possible, but if it should be found necessary or advisable, Mr Pitcairn shall nevertheless be at liberty to sequestrate for his security, or adopt any similar measure; and, in like manner, if either party shall have omitted any thing herein, it shall be understood and construed to fall under the above submission, that every thing may be fairly adjusted betwixt the parties, without trouble or expense.’

A dispute having taken place as to the terms in which the submission should be expressed, Pitcairn applied to the Sheriff of Perthshire for a warrant of sequestration; in defence against which Drummond founded on the agreement, in reference to which the Sheriff pronounced this interlocutor:—‘ Finds it instructed by the written agreement betwixt the parties, of 28th April last, executed at the same time with the renunciation, that every obligation incumbent on the tenant, and every obligation incumbent on the proprietor, either as constituted by the present leases or otherwise, were, if these parties could not adjust them among themselves, to be made the subject of a reference to two respectable men, to be mutually chosen, with power to them to choose an oversman in case of difference of opinion, and the award of either arbiters, or the oversman, in their order, should be obligatory on both parties, and should be final; and in case either party should have omitted any thing in the said written agreement, it should be understood and construed to fall under the above submission, that every thing might be fairly adjusted between the parties, without trouble or expense: Finds, that as, in carrying the submission into effect, it is not essentially necessary that the agreement to be executed should contain a full narrative of what preceded it, or should enter into a detail of the mutual claims of the parties, the arrangement agreed upon will be best carried into effect, according to its true spirit, by a general submission, not containing any particular narrative, nor particularizing the claims of the parties, all which can, with equal propriety, be fully brought into the view of the arbiters, in their mutual claims and written pleadings, in the course of the submission; and appoints the draughts of the proposed submission to be adjusted by the agents for the parties on the above principles, and thereafter to be extended and signed without delay: Finds, that although;

May 20. 1825.

‘by the said agreement, the proprietor, if it shall be found necessary or advisable, was to be at liberty to sequester for his security, or adopt any similar measure, it was agreed that the tenant should be allowed to sell the crop and stocking in his own name, at or about the term of Lammas for the crop, and Michaelmas for the stocking, and allowing a credit to purchasers on security till Candlemas next; but all the bills were to be made payable directly to the proprietor, or his factor for his behoof, to be delivered to them in payment of the arrears of rent; and as the defender declares his readiness instantly to concur in the sale of the stocking, and to concur with the pursuer as to the proper time most likely to ensure the best price, the Sheriff recommends to the agents for the parties immediately to make the necessary arrangement for that purpose, with certification to the defender, that if he shall fail to do so in the course of this day, warrant will be granted to-morrow to the pursuer to dispose of the effects by public roup under the sequestration, that the roup may be advertised at the parish churches in the neighbourhood on the day following, so as to avoid any farther delay, when the circumstances of the case will not admit of it.’ In consequence of this interlocutor, a submission was executed on the 30th of November 1812, in these terms:—‘John Pitcairn, Esq. of Pitcairns, on the one part, and David Drummond, his tenant, or lately his tenant in the farm and mill of Pitcairns, on the other part, have submitted and referred, and do hereby submit and refer, all claims, questions, disputes, and differences of every kind, depending and subsisting betwixt them, upon any account, transaction, or occasion whatever, preceding the date hereof, to the amicable decision, final sentence, and decret-arbitral, to be given forth and pronounced by James Duncan, tenant at Mains of Cargill, and Thomas Dow, farmer at Cultmalundy, arbiters mutually and indifferently chosen by them; or, in case of difference of opinion betwixt the said arbiters, to any oversman to be named by them,’ &c.

Among other claims which were made by Drummond, was one for the price of the reversion of his lease, according to its improved value, for the thirteen years for which it would have endured had there been no decree of declarator of irritancy and of removal. This demand was resisted by Pitcairn, on the ground that it did not fall under the submission; but a proof having been allowed by the arbiters, he adduced witnesses in op-

May 20. 1825. position to those brought forward by Drummond. The arbiters having differed in opinion, and having appointed an oversman, he pronounced a decree-arbitral, finding that Drummond was owing an arrear of rent of L. 475. 12s. 8d.; 'but in respect it 'had been established by respectable witnesses, that the land had 'been improved, manured, and otherwise meliorated by the tenant during the time he was in possession of the farm, by 'which means it was in a more productive state when he removed than at his entry, the benefits arising from which had 'been, and would continue to be, reaped by the proprietor 'for the unexpired period of the lease, being thirteen years 'from the term of the tenant's removal; from that consideration, 'and in regard the mill-houses were completely in a state of ruin, 'and had not been repaired by the proprietor, whereby the tenant could not, during the time he was in possession of the mill, 'reap any adequate benefit by the manufacturing of grain, the 'said oversman decreed the proprietor to pay, on these accounts, to the tenant, the sum of L. 848. 8s. 5d. sterling, but 'with and under deduction always of the foressaid balance of 'L. 475. 12s. 8d. due by David Drummond.' And accordingly the oversman gave a decree for the sum of L. 369. 15s. 9d., being the difference between these two sums.

Thereafter, a creditor of Drummond having arrested in the hands of Pitcairn, and brought a forthcoming, Pitcairn raised an action of reduction of the decree-arbitral, in support of which he maintained, That as the claim for meliorations had never been made by Drummond prior to the date of the submission, and did not fall under the terms of the lease; and as it neither was nor could be contemplated by Pitcairn at the date of executing the submission, seeing that he had acquired the absolute right to the farm by virtue of the decree of irritancy and removing, and was under no obligation to pay any thing for the reversion, or for meliorations; the oversman had exceeded his powers in pronouncing decree for such a claim.

To this it was answered, That the words of the submission were of themselves sufficiently broad to embrace the claim; that it was one which existed prior to the date of the submission; and as that deed had been framed in terms of the interlocutor of the Sheriff, not particularizing the respective claims, but employing general words, which might include every thing which either party might have omitted to specify in the agreement, the decree-arbitral was binding and effectual.

The Lord Ordinary found, 'That iniquity or injustice, however apparent, affords no ground for setting aside a decree-arbitral; that the submission in question was sufficiently ample, and included every subject of claim or dispute which existed between the parties; and that in the agreement which was subscribed by the parties when the renunciation was granted, every obligation incumbent on the proprietor, as constituted by the leases or otherwise, was referred to arbitration, if the parties themselves could not adjust them; and the submission afterwards entered into by the parties was sufficiently broad to embrace all the points decided by the decree-arbitral;' and therefore repelled the reasons of reduction, and absolved Drummond. Against this interlocutor Pitcairn presented a petition; but the Court refused it, without answers, on the 24th May 1823.* Pitcairn then appealed; but the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

May 20. 1825.

Appellant's Authorities.—4. Ersk. 3. 32.; Steel, June 22. 1809, (F. C.)

A. MUNDELL—C. ARNOTT,—Solicitors.

W. STIRLING and Others, Appellants.

No. 25.

Mrs HOUSTON and Others, Respondents.

Jurisdiction—Foreign.—An Englishman, residing in England, having died indebted to certain parties in Scotland, arising out of mercantile transactions; and being creditor of persons resident in Scotland, against whom he had raised actions in the Court of Session; and having nominated executors, who administered in England, claimed in a sequestration, and cited themselves as parties to the actions, but did not confirm in Scotland; and the Scottish creditors having obtained from the Judge-Admiral letters of arrestment jurisdictionis fundandæ causa against the executors, and thereupon arrested in the hands of the Scottish debtors to the defunct;—Held, (affirming the judgment of the Court of Session), That the arrestment was inept to the effect of founding a jurisdiction against the executors.

THE late James Henry Houston, merchant in London, was creditor of various persons in Scotland, and particularly of Allan Scott and Son, merchants in Glasgow, (on whose sequestered estate he claimed for upwards of £.14,000), and also of the Banton Coal Company, and Walter Logan, a partner of that Company. Against these parties respectively he raised actions in

May 20. 1825.

2D DIVISION.
Lord Reston.

May 20. 1823.

the Court of Session. On the other hand, he was indebted to several persons in Scotland, and particularly to the appellants, Stirling and others, who were merchants in Glasgow. He died in October 1814, leaving a will, by which the respondent, Mrs Houston, was named his sole residuary legatee, and she, together with John Peter Houston, Benjamin Shaw, and Stephen Nicolson Barber, were appointed his executors, all of whom resided in England, or elsewhere abroad. Immediately after Houston's death the respondents proved the will, and obtained letters of administration from the Prerogative Court of Canterbury; but they did not apply to be decerned executors in Scotland, nor did they obtain any confirmation of the effects situated there.

In virtue of the will and these letters of administration, the respondents sisted themselves as parties in the actions depending in the Court of Session, and claimed a dividend upon the estate of Allan Scott and Son, which was allotted but not paid to them.

In the meanwhile the appellants, as creditors of Mr Houston, with the view of obtaining a confirmation *qua* executors-creditors, presented a petition to the Judge-Admiral, for letters of arrestment *jurisdictionis fundandæ causa* against the respondents, which they accordingly obtained. These letters bore, that as the appellants were about to raise action against the respondents, who represented the late Mr Houston, and as they were 'foreigners, and do not reside within the jurisdiction of the Judge of our said High Court, and have goods and effects in the hands and custody of several persons in this country, which they intend to withdraw, to the complainers' manifest defraud and prejudice, therefore it is necessary to have letters of arrestment to found a jurisdiction.' The will accordingly was, 'to arrest all goods, &c. belonging to the said John Peter Houston, Elizabeth Houston, Benjamin Shaw, and Stephen Nicolson Barber, *jurisdictionis fundandæ causa*;' in virtue of which an arrestment was executed in the hands of the trustee of Allan Scott and Son, as being addebted 'to the said John Peter Houston,' &c. The appellants then raised an action before the Admiralty Court, founding on this arrestment, and concluding for decree against 'the said John Peter Houston, as representing his said deceased brother on one or other of the passive titles as aforesaid, and the said Mrs Elizabeth Houston, Benjamin Shaw, and Stephen Nicolson Barber, as executors and administrators foresaid.' The summons was executed at the market-cross of Edinburgh,

pier and shore of Leith, and decree in absence was pronounced and extracted. May 20. 1825.

Founding on this decree the appellants obtained an edict from the Commissary Court for citing 'the executors-testamenters, spouse, bairns if any be, and intromitters with the goods and gear of umquhile J. H. Houston,' &c. which was executed by a mace at the parish church of St Giles; and no appearance having been made, the appellants were decerned and confirmed executors-creditors, and as such entitled to the debts due to him in Scotland.

Of these proceedings the respondents were not aware until a claim was lodged by the appellants in a multiplepoinding brought by one of the debtors of Mr Houston, and in virtue of which the appellants claimed a preference.

The respondents then raised an action of reduction of the decret obtained before the Judge-Admiral, and of the confirmation, in support of which they maintained,—

1. That as the funds which had been arrested in order to found a jurisdiction against them had never been confirmed by them, and therefore remained in bonis of Mr Houston, and consequently could not be regarded as their funds, no jurisdiction had been competently found against them, so that the decree and the whole subsequent proceedings were null and void; that although they had no doubt claimed upon the estate of Allan Scott and Son, yet this could not have the effect to take the fund out of the *hereditas jacens* of Mr Houston, and transfer it to them; and that as the decree had been extracted, it was not now competent to restrict it to one *cognitionis causa*.

2. That, even supposing a jurisdiction had been competently founded against them, yet, as they were foreigners, and not liable to be called to appear in any Inferior Court, and as the debt was not of a maritime nature, and the Court of Admiralty was (except in such cases) an Inferior Court, and had no power to cite foreigners at pier and shore in relation to cases not maritime, the decree which had been pronounced was inept. And,

3. That as the appellants were aware that the respondents were the executors of Mr Houston, they were bound to have cited them specially, and not in the general terms contained in the edict.

On the other hand, it was contended by the appellants,—

1. That although the respondents had not confirmed the effects which had been arrested, yet they had lodged a claim in the sequestration, and so held themselves forth as having right

May 20. 1823. to them; and that, were their plea to be sustained, it would have the effect of preventing Scotch creditors from ever obtaining justice, in their own Courts, against the foreign executors of their debtor who had funds in this country; but that, at all events, they were entitled, on the principle of the case of M'CGrilla, to have the decree restricted to one *cognitionis causa*.

2. That the Court of Admiralty had, by long established practice, a jurisdiction both in maritime and commercial cases over foreigners who were cited in the manner which had here taken place. And,

3. That the procedure before the Commissaries was perfectly correct, and the appellants were not bound to call the respondents in any other terms than those which they had done.

The Lord Ordinary 'repelled the objections to the regularity of the procedure before the Admiralty and Commissary Courts; found that the nomination of the pursuers as executors, and steps taken by them, form no legal objection to the confirmation of the defenders, whose debts are not disputed;' and therefore assolizied them. And to this interlocutor he adhered, 'in respect that it had been uniformly averred by the defenders, and is not denied by the pursuers, that the citation of the Commissary Court was in the usual terms.'

The respondents having reclaimed to the Court, their Lordships 'repelled the objections to the form of serving the edict of the Commissary Court, and allowed the defenders to give in a minute stating more fully the practice of the Admiralty Court in cases similar to the present one, specifying the cases on which they found their allegation as to the practice;' and thereafter 'found, that the arrestments *jurisdictionis fundandæ causa* were inept, and that the decrees which followed upon them were null and void;' and therefore decerned in terms of the libel. And on the 3d of February 1824 they refused a petition without answers.*

Stirling and others then appealed, and in addition to their former pleas maintained, that as the respondents had sisted themselves as parties in processes depending in the Court of Session, they were barred by the principles of reconvention from objecting to the jurisdiction; but the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L.100 costs.'

* 2. Shaw and Dunlop, No. 634.

Appellants' Authorities.—Ashton, Hodgson and Co. v. M'Crill, June 17. 1773, May 20, 1825. (4835.); 1. Ersk. 2. 19.; Mansfield, Ramsay and Co. June 17. 1795, (2594.); 54. Geo. III. c. 137. § 32.; 2. Bell, 347.

Respondents' Authorities.—4. Stair, 19.; 2. Ersk. 12. 47.; 1. Ersk. 2. 18.; 2. Bank. p. 393.; 3. Ersk. 9. 37.; 3. Stair, 8. 62.; 3. Ersk. 9. 37.; Haliburton, June 25. 1663, (16,090.)

J. CAMPBELL—GREIGSON and FOWERERNE,—Solicitors.

JOHN DUGUID, Appellant.

No. 26.

Mrs SUMMERS OF MITCHELL, and Mrs JANET KYNOCK
or MITCHELL, Respondents.

Ordn of Caution—Stamps.—A party having raised an action on a bond granted to his father in 1782, for the principal sum and interest from that date; and the defenders having alleged that the whole interest had been paid, but being unable to produce stamped receipts for it prior to 1816; and having required the party to emit an oath of calumny, and he having declined to depose that he believed the interest was due, but having sworn merely that money to the extent sued for was due; and the defenders having paid the principal sum;—Held, (affirming the judgment of the Court of Session), 1. That they were entitled to be absolved; and, 2. Question raised, but not decided, as to the effect to be given to unstamped receipts.

In 1782 George Laing, mason in Aberdeen, proprietor of a piece of ground in that town, borrowed from the late John Duguid, father of the appellant, L. 200, for which he granted an heritable bond over the ground. This property was acquired in 1785, subject to the heritable burden, by James Mitchell, father of the respondent Mrs Summers, and husband of the other respondent Mrs Kynock or Mitchell. He died about 1816, having conveyed his property to his wife in liferent, and to his daughter in fee. In June 1816 Duguid died, and was succeeded by his son, the appellant, a captain in the Aberdeenshire militia. The respondents alleged that the whole interest had been paid till the 20th of June of that year inclusive; tendered payment of the principal sum to the respondent in September thereafter; and required a discharge from him. The appellant, not being satisfied that all the prior interest had been paid, declined the offer; and the respondents thereupon brought an action, concluding that he should be ordained to receive payment of what was due to him, and grant a discharge and renunciation of the bond. He defended himself at first on the ground that he was entitled to the benefit of the *annus deliberandi*, but

May 25. 1825.

1st DIVISION.
Lord Meadowbank.

May 25. 1825. having thereafter admitted that he was ready to receive payment of the sums due to him, and grant a discharge, a decree to that effect was pronounced. The question still, however, remained unsettled as to what was the amount of the sum due. The respondents alleged that the whole interest had been paid, in evidence of which they founded upon two unstamped acknowledgments, one dated 20th June 1816, and the other 20th June 1817, which had been inserted in a book kept by the respondent Mrs Mitchell, subscribed by the appellant's father, and alleged to be holograph of him; and another receipt, written upon a stamp corresponding to the sum of L.10, and which was thus expressed:—‘Aberdeen, 20th June 1818.—Received from Robert Shand, Esq. for Mrs Mitchell, the sum of L.10 sterling, being interest of the late Mr James Mitchell's heritable bond to me, due at this date. (Signed) JOHN DUGUID.’ On the other hand, the appellant, while he stated that he was willing to give credit for the sum contained in this latter receipt, denied that there was any legal evidence of any other payment, and therefore insisted on payment of the whole previous interest. To enforce this demand he brought an adjudication against the respondents for payment of the aforesaid principal sum of L. 200 sterling, annualrents thereof from the said 20th day of June 1782 to the date of the decree to follow hereon, but under deduction always of any part of said annualrents they can instruct to have legally paid.’ In defence the respondents repeated their averment, that the whole interest had been paid up to 20th June 1818 inclusive, in support of which they founded upon the three consecutive receipts as forming legal evidence of a discharge of all previous interests; and contended that at least the unstamped documents might be referred to as collateral evidence, in connexion with the one which was stamped, to establish that fact; or that the latter, from the mode in which it was expressed, was to be held as a receipt in full. To this it was answered by the appellant, that a court of law could not regard any documents which were not duly stamped; that he was not satisfied that the acknowledgments of 1816 and 1817 were holograph of his father; that it was impossible to consider the receipt of 1818 as a legal discharge in full, because it was written upon a stamp corresponding to L.10, whereas the statutes required that a receipt in full should be written upon a stamp of 10s. value. Lord Gillies, before whom the case originally came, granted a diligence against havers, which was executed, and in virtue of which the appellant was examined, who inter alia deponed, in reference to a question, whether he knew

May 25. 1825.

or suspected where any of the writs called for were, 'That he does not know or suspect where any such will be, unless that he suspects these may be in the hands of Mrs Mitchell, the defender in the present action; and his reason for this suspicion is, that he understood and is certain that she was in the practice of keeping an account of the transactions betwixt her and the deponent's father, as to the accumulated interest of the bond in question; and that he is certain that she told the deponent that she was due his father L. 200 over and above the bond, which L. 200 she said she had paid him; that he has not put any papers away since he was cited as a haver, nor at any time, with a view to disappoint the defenders.' Thereafter, on the diligence being reported, and the case having come before Lord Meadowbank, he appointed the respondents to lodge a condescendence of their averments in support of their defence, and the appellant to give in answers. The respondents accordingly put in a condescendence in the following terms:—'On the 20th of June 1816, the pursuer's father, the late Mr Duguid, did, with his own hand, make an entry in the account-book kept by the defender, Mrs Mitchell, of the payment of one year's interest of the bond libelled upon, in these terms:—
"Aberdeen, June 20th 1816.—Then received from Mts Mitchell ten pounds sterling, being one year's annualrent of two hundred pounds sterling, from Whitsunday fifteen to Whitsunday sixteen.

JOHN DUGUID."

'2d, In the year 1817 the late Mr Duguid made a similar entry in Mrs Mitchell's account-book, as follows:—"Aberdeen, June 20th 1817.—Then received from Mrs Mitchell ten pounds sterling, being one year's interest of two hundred pounds sterling, from Whitsunday 1816 to 1817.

JOHN DUGUID."

'3d, There is produced in process a receipt written on stamped paper, dated 20th June 1818, not for one year's interest, but for the interest due at the date of the receipt. It is in the handwriting of the clerk of the late Mr Duguid's man of business, and it is subscribed by the late Mr Duguid himself. Its terms are these:—"Received from Robert Shand, Esq. for Mrs Mitchell, the sum of ten pounds sterling, being interest of the late Mr James Mitchell's heritable bond, due at this date.

JOHN DUGUID."

'4th, Before writing out this receipt, Mr Duguid's man of business asked his client, whether there were any former year's interest due, or whether the sum which he was about to receive comprised the whole interest then due upon his bond? and it

May 25. 1825. ' was upon Mr Duguid's informing him in answer, that there
' was only one year's interest due, that the receipt was expressed
' in the terms which have been quoted, instead of stating that it
' was the interest from Whitsunday 1817 to Whitsunday 1818.

' 5th, On the 20th June 1816, Mrs Mitchell paid the late
' Mr Duguid a sum of L.10 sterling, or at least of L.100 Scots,
' in name of interest on the heritable bond in question.

' 6th, On the 20th June 1817, the defender, Mrs Mitchell,
' paid the pursuer's father a farther sum of L.10 sterling, or at
' least of L.100 Scots on the same account.'

Note.—' Before proceeding any farther, the defenders would
' humbly submit, that this is a case in which it would be proper
' to ordain the pursuer to be examined de calumnia.'

To this condescendence the following answers were made for
the appellant:—

' Article 1. The receipt, or alleged receipt here referred to,
' has been all along in process. The respondent does not know
' that his father wrote it as alleged, but whether he did so or not,
' it is a receipt without a stamp; and farther, it does not bear to
' be for interest on the bond referred to. The respondent was
' given to understand by one of the defenders, (Mrs Janet
' Kynock or Mitchell), in the course of the discussions previous
' to the commencement of this process, that no less than L.200
' sterling of interest had been allowed to accumulate upon the
' bond before the date of this alleged receipt; and the respondent
' has little doubt but that the receipt applies to interest upon
' that accumulation of L.200 sterling. It does not specify that
' it is for interest upon any heritable bond whatever.

' 2. Is met by the same answer.

' 3. This has been always admitted to be a regular receipt,
' and it is the only receipt produced.

' 4. The respondent cannot know, as his father is now dead,
' whether the statement here made be true or not; and he does
' not admit the fact to be true, nor can he do so until it is proved
' by legal evidence; and he farther denies its relevancy.

' 5, and 6. The allegations made in these articles are already
' answered under the first heads of the condescendence. There
' is no legal evidence of these alleged payments, and it is denied
' that they were made as here stated.

' *Note.*—The note subjoined to the condescendence should be
' expunged, as not warranted by the Act of Sederunt, and parties
' appointed to be heard. Before the pursuer, however, can be
' called upon to be examined de calumnia, the Act of Sederunt

18th January 1692 requires, that the statements referred to the oath of calumny shall have been found relevant for the party requiring the oath. But there has been no finding of relevancy here, and the relevancy is denied.' May 25. 1825

Afterwards, these pleadings were appointed to be seen and revised.

On this occasion the respondents made the following addition to their condescendence:—'The defenders adhere in all respects to their original condescendence; and with reference to the first article of the answers, they deny that any debt of L. 200 of interest had been allowed to accumulate upon the heritable bond before the date of the first receipt quoted in the condescendence, or that they owe the pursuer any sum whatever, excepting the sum contained in the said heritable bond itself, with the interest thereof from the term of Whitsunday 1818.'

The appellant made the following addition to his answers:—'Having now seen the revised condescendence, the Counsel for the pursuer has only to add, that he adheres to the statement of facts which he has given in the above answers. And as to the relevancy of the condescendence, he prays to be heard upon it, if your Lordship has any doubt.'

Parties having been heard, Lord Meadowbank found, 'That the two writings produced by the defenders, and founded upon by them, as receipts for interest due upon the bond libelled for the years 1816 and 1817, cannot be sustained in support of the plea of presumed payment, the Stamp Act declaring, that such writings not being stamped cannot be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available, in law or equity; and farther finds, that the condescendence is *hoc statu* irrelevant; but before farther answer, remitted to a commissioner to take the appellant's oath de calumnia. The respondents lodged a representation against the finding in the above interlocutor, which was superseded till the oath should be reported. The appellant was then examined, and emitted the following deposition:—'Interrogated for the defenders, Whether or not he believes that the interests of the bond libelled on are actually due and unpaid?'

'*Objected.*—The question now put is irregular, and is not authorized, either by the interlocutor of the Lord Ordinary, or by the Act of Sederunt 18th of January 1692, which regulates the proceeding regarding the taking of oaths of calumny. By that Act it is declared, "that if the party against whom any

May 25. 1825. ' point of allegiance is to be proven, require the oath of calumny
 ' of the party proponing the same, the terms shall be, that he
 ' may inquire, Whether he knows the thing that he proposes is
 ' not true?" The only questions, therefore, which the defenders
 ' can put under this Act are, first, Does the deponent believe
 ' the debts sued for to be due? and, secondly, Does he believe
 ' the statements contained in the answers for him to the condes-
 ' cendence for the defenders to be correct? They are not entitled,
 ' on any pretence, to go into an examination regarding the par-
 ' ticulars of which that debt is made up; such an examination is,
 ' in fact, prohibited by the Act; and it is requested that the com-
 ' missioner will confine the defenders to the mode of examination
 ' therein pointed out.

' *Answered* for the defenders.—That the law quoted by the
 ' pursuer is not in point. It appears by the act and commission
 ' produced, that the pursuer's libel subsumes, "that true it is that
 ' the foresaid sums of money, principal, interest, and liquidate
 ' penalty, contained in the said bond above narrated, are justly
 ' resting unpaid;" and the question proposed goes to inquire,
 ' Whether the pursuer knows or believes that it is not true that
 ' the interest libelled for is unpaid? An oath of calumny would
 ' be of no use, if the party to whom it was put could get off by a
 ' general answer, under which there might be either mental reser-
 ' vation or reference to a point of law. The intention of an oath
 ' of calumny is to make an appeal to the party's conscience as to
 ' his own belief of the justice of his cause, or the truth of some
 ' particular fact on which he founds his action. Here there is no
 ' question as to the principal sum; the dispute is entirely about
 ' the justice of the pursuer's claiming interest on the bond libelled
 ' since the time it fell due; and the pursuer is certainly bound to
 ' say, upon his oath, whether or not he himself believes that this
 ' interest which he claims is actually due, and has not been paid;
 ' and therefore the question proposed is again repeated, and the
 ' pursuer is required to answer it, or to say that he refuses to
 ' answer it.

' *Replied*.—The pursuer is quite ready to give a regular oath
 ' of calumny, in terms of the Lord Ordinary's interlocutor. He
 ' has stated what he considers to be the proper mode of proceed-
 ' ing in taking his oath. No relevant answer has been made to
 ' that statement. To save farther trouble, however, the pursuer
 ' shall proceed to state all that he thinks he can be regularly called
 ' upon to say; and as it is believed that his statement will, in fact,
 ' contain an answer to the special question which has been objected

‘to, it is hoped the defenders will not, by entering into farther particulars of the same nature, put the pursuer under the necessity of entering into farther discussion. May 25. 1825.

‘And, of himself, the pursuer depones, That he believes money, to the extent sued for, is due, and that he also believes all the statements contained in the answers for him to the condescendence for Mrs Mitchell or Summers, &c. to be true, with this explanation of article 1st, that the sum of L.200, therein mentioned, was acknowledged by Mrs Janet Mitchell to have been due by her or her husband to the deponent’s father, over and above the heritable bond sued for in this action; but whether it was for accumulated interest, or on any other account, the deponent cannot positively say; but of this he is confident, that such a sum was due by her or her husband to his the deponent’s father, previous to the 20th of June 1816, and he has good reason to believe that said sum is still due. Whereupon the commissioner put the following question to the deponent, viz. Whether or not, to the best of his knowledge and belief, he has good cause to insist in the present process of adjudication against Mrs Mitchell and others, and that the grounds and conclusions of said action are just and true? depones, That he considers the answer already made to the first interrogatory to be sufficient in answer to the second. Again interrogated for the defenders, Whether he believes the interests of the heritable bond libelled on to be due and unpaid? declines answering the question now put, or any other that can be put, as he considers the answers already given as sufficient to exhaust what is properly comprehended under an oath of calumny. And the deponent being required to look at an unstamped receipt, dated the 20th June 1817, and another unstamped receipt, dated the 20th June 1816, appearing to be written and subscribed by the pursuer’s father, each of them for L.10, as a year’s interest of L.200, and to say whether he believes that these receipts are of his father’s handwriting?

‘Objected.—This question being put, clearly shews the propriety of the objection stated to the first question, and indeed the absolute necessity the pursuer was under of stating that objection. This question is, if possible, still more irregular than the first. It is required by the Act of Sederunt, that any allegiance on which a party is asked to give his oath of calumny, should have been found relevant for the party who requires the oath. In the present case, the Lord Ordinary, by interlocutor of 4th December last, expressly found, that the writings now attempted to be exhibited were not probative, and could not bear faith in judg-

May 25. 1825. 'ment; and he also found, that the allegiances founded upon them
' by the defenders were irrelevant. The defenders, therefore, are
' not entitled to ask one word at the pursuer regarding them; and
' this being his opinion, he declines answering the question.

' On this it was observed for the defender, That the validity of
' the receipts is not the question here. The defender makes an
' appeal to the pursuer's conscience, and asks him, upon looking
' at these receipts, to say, upon his oath, whether he thinks or be-
' lieves that his father would have signed and delivered these re-
' cepts without receiving the money therein mentioned?

' Objected.—The same objection applies to this question as to
' the last; and, for the reasons there stated, the deponent declines
' to answer it. And another receipt being exhibited before the
' commissioner, dated 20th June 1818, written on a stamp, and
' subscribed by the pursuer's father, for L. 10 sterling, "being the
' interest of the late Mr James Mitchell's heritable bond to him,
' due at that date;" and the said receipt being presented to the
' pursuer, he was required to say, whether or not he believed that
' this receipt was meant to be a receipt in full?—Objected.—This
' question is irregular; but it has been already answered in the
' answer given to the first question; and the deponent refuses to
' give any further answer, or to look at the receipt. All which,
' in so far as the deponent has answered the interrogatories put, is
' true, as he shall answer to God.'

On advising the oath, Lord Meadowbank 'sustained the oath
' de calumnia,' and refused the representation. Thereafter the
respondents lodged a bank receipt for the principal sum, with
interest at 5 per cent to the 12th July 1820, (at which time they
had consigned it), and at 3 per cent thereafter, which they
indorsed to the appellant, and it was delivered to him. They
then presented a petition to the Court, both on the question
relative to the stamp laws, and to the effect to be given to the
oath de calumnia; and, at the same time, they produced five
unstamped receipts, from the 1st June 1802 to June 1806, by
the appellant's father, for interest. On advising this petition,
with answers,

The *Lord President* observed, That his chief difficulty was
as to the want of stamps, which rendered it impossible to hold
the three consecutive receipts as affording a legal presumption of
the payment of the previous interest.

Lord Hermand was of the same opinion, and observed, that
the case of Brown against Murdoch, as decided in the House of

Lords, was extremely strong on the question as to the stamp-laws.* May 25. 1825.

Lord Balgray observed, That this was a case attended with some difficulty, and of which he did not like the complexion.

* The case referred to by his Lordship, which is dated 20th March 1815, it is believed is not reported; but the following notes, taken by Mr Gurney, of the opinions of Lords Chancellor Eldon and Redesdale were appended to the appeal case of the appellants, and contain a statement of its nature:— *Brown v. Murdoch*, 20th March 1815.

Lord Chancellor.—My Lords, I confess fairly to your Lordships, as an individual, I have been so distressed in disposing of this case in the only way in which it can be disposed of, that nothing but the most absolute conviction, that we can do no otherwise, induces me to state to your Lordships the proposition with which I mean to conclude. It will be in your Lordships' recollection, that this was a cause in which the appellants were persons denominated, 'The Weavers' Society of Old Monkland'; the respondents, Alexander Murdoch, and other persons, feuars at Baillieston; and it seems that the managers of this society had, in consequence of an old well failing to supply water to their property, opened a new well, and they applied to the respondents, the neighbouring feuars, to join them in the expense; and accordingly there is a minute of the officers of the Monkland Society, dated the 13th of April 1804, in which they state, 'That the society's well having gone nearly dry, on account of the water being carried off by an opening in the roof of a new driving mine from a coal-pit at Baillieston, it was canvassed pretty fully before the meeting, whether or not it would be proper and prudent for the interest of the society, to cause the said well to be cleansed or dug deeper, when they thought to do either of these properly would run the society to a great deal of expense, and perhaps be entirely fruitless; therefore they thought it would be most prudent to try if a surface spring could be found in any of the lands on the north side of the adjacent turnpike road, (where liberty for such is granted in the society's feu-rights), by digging the same about six or seven feet deep; same time to acquaint the neighbouring feuars of the said proposition, to see if they would bear an equitable proportion of the expense that may be incurred wherever it may be found, and the persons on whose property it may be found to be indemnified for surface damages, by their receiving the benefit of the water;' and it is represented in the respondents' case, from which I take the present statement, that this minute bore to be done 'by the whole office-bearers of the society, and it was duly entered in their books.'

My Lords,—There is another minute, which bears date on the 10th of September 1804, but it has a reference,—and I mention that circumstance in order that it may be seen it has not been overlooked,—it has a reference to what passed by parole on the 28th of August 1804. This minute is thus expressed:—'The committee for superintending the cleaning, &c. of the society's well having been unsuccessful in their search for water, the meeting therefore have resolved to warn the several feuars in the neighbourhood of the said well, to attend a meeting of theirs, which the preses shall appoint with all convenient speed, to be held at Baillieston Toll, in order to co-operate with them in making a farther search for water; which meeting was held accordingly in the house of Alexander Sym, spirit-dealer in Baillieston Toll, August 21st 1804, and the following resolutions concluded upon:—That whereas the well situate between the old turnpike road leading between Glasgow and Airdrie, and the houses belonging to the Old Monkland Society of Weavers, was at first sunk thirty feet deep, and finished off with a wooden pump at the expense of said society, and for the behoof of

May 25. 1825. There were three questions involved in it. 1st, As to the effect of the oath; 2d, Of the unstamped receipts; and, 3d, Of the stamped one per se. With regard to the oath, he did not think that the pursuer had answered as he was bound to have done.

‘ their houses, exclusive of all others, for which there was an exuberant supply of water; but in last spring, when a mine was driving from a coal-pit in Barachine grounds, it had accidentally been driven under the same strata of metal where the water ran which supplied said well, by which means, a crater or vein of the water having burst out in the roof of the mine, the water was carried off from said well, so that it subsided nearly to the bottom, and on that account was insufficient to supply said society’s tenants. In order to remedy which, the managers of said society thought proper to make a trial, by taking the level of it with a neighbouring well belonging to John Kent, Langrees, to find what probability there would be of getting water before they put themselves to the expense of sinking deeper, by which means it was found out almost to a certain probability, that there would yet be a plentiful supply of water by sinking said well from ten to twenty feet deeper; but considering it would bear hard on the society alone, they agreed to warn the several tenants in the neighbourhood, who were equally in need of water, to attend a meeting of their appointment, in order to co-operate with them in making further trial for water. Accordingly, the following managers of the society, and feuars, met in the house of Alexander Sym, spirit-dealer, Baillieston Toll, on Tuesday the 28th day of August 1804 years, viz. John Brash, preses; David Donald, James Aitken, John Fergus, James Brash, John Baird, Robert Selkirk, James Turner, William Gilchrist, and John Calder, masters; James Thomson, clerk; James Walker, James Meikle, and Alexander Sym, representative for Alexander Murdoch, proprietor of his house, feuars; when the managers of said society formed the following resolutions:’ So that what they did at that time is not, your Lordships perceive, a parole agreement on the part of the managers and feuars; but these are represented to be the resolutions which the managers of the society formed.

They then state their several resolutions, and they state in what circumstances the feuars in the neighbourhood, if they thought proper to make a payment of a proportion of the expenses, should have the benefit of this well which the society were to make; and none of the present feuars were to have the benefit of that well, unless they paid their proportion of the expenses. And there is this resolution:—‘ That in case of the society selling their houses at any time, such feuars as have right to said well shall take care to provide, that their right thereto be inserted in the papers granted by the society, to such as may purchase them, in order that they may preserve their property of the same, and prevent all dispute relative thereto; also any one or more feuars may have, whenever required, a double of these presents, extended on stamped paper, on his or their own expense,—which offer, as contained in these resolutions, the following feuars do hereby accept of and agree to.’ So that the proceeding on the 28th of August, your Lordships observe, was nothing more than the formation of resolutions by the managers of the society; and this instrument of the 10th of September, is an instrument by which certain feuars do hereby accept and agree to those resolutions. I mention this particularly, to point out that it was strongly pressed at the Bar,—that this should be taken as a parole agreement,—that you are to look at what passed on the 28th of August as a parole agreement,—that this paper, therefore, might be laid out of the question,—and that if so, there could be no occasion to stamp it. The first answer to that is, that there was no such agreement on the 28th of August; and the next answer is, that if there had been such sort of parole agreement, (and there is a subse-

He had attempted to shelter himself under an ideal claim, different from that for which he was suing; and there was throughout his deposition an evident attempt to escape from making a

May 25. 1825.

quent written agreement), the subsequent written agreement must be the ground of the action. But supposing there had been nothing but a parole agreement, if the parole agreement is proved by nothing but a writing, not itself the agreement, the objection of the want of a stamp is just as strong against it as evidence of the agreement, as it is to there being no stamp upon the agreement itself. The real question therefore is, whether this is an agreement, regard being had to the subject of it, which, under various Acts of Parliament, is required to be stamped? And though it is stated, that the feuars shall have a double of this instrument, yet, inasmuch as they could not shew their right to that without this, if there was no stamp upon the agreement, nor upon that which is evidence of the agreement, I am afraid that was a decisive answer to the suit.

Now, my Lords, it has not been, and cannot be denied, that that was sufficiently brought before the Court,—I mean the fact, that this agreement, which was the foundation of the suit, or, if it is not to be represented as an agreement, this which was evidence of an agreement, was not upon a stamp; and indeed if there had been less of objection on the part of those who were defending than was made, (but there was a sufficient made),—if there had been less objection made, I am afraid it is the duty of a Court to say, that the evidence should be such evidence as the Court has given an admissible character to; for it is said, that no argument shall be available,—that no writing shall be available, whether it is an agreement or evidence of it,—it is not in the power of the Court, in consequence of the party's not taking an objection, to receive as legitimate evidence that which the Legislature does not permit to be available.

Now, my Lords, one cannot help seeing that the whole of the subject-matter is the sinking a well about twenty feet. One cannot imagine that could be an extremely heavy expense; but the misfortune is, that the expense was in a great measure incurred; and I conceive that your Lordships will feel extremely sorry that the parties, instead of going the right way to work, that was, by procuring this agreement to be stamped, (paying a small penalty), should go on through resolution after resolution: But the single question for your Lordships, as it appears to me, to decide is, Whether this suit can be maintained, which has its foundation on a writing—which writing the Court is prohibited by an Act of Parliament from looking at for that purpose.

My Lords,—There was another question in this case certainly, and that was, Whether those who, on the part of the society, did something, could bind the whole of the society? And with reference to that, one of the interlocutors contains a declaration, that this was a very beneficial thing in the administration of the property among the weavers, and therefore sustains the act of those who did sign the agreement. It is not necessary for us to give any opinion upon that, but I do not think our judgment would be right, if we left it as a point to be understood, that we meant to affirm that.

Under these circumstances, it is with some degree of painful hesitation I am obliged to move your Lordships to reverse the several interlocutors complained of, and to declare, that there being no stamp upon the entry in the books of the society, whether the same is to be considered as the agreement between the parties, or as evidence of that agreement,—no legal proof having been made of any agreement between the respondent and the persons described in the interlocutor of the 20th of June 1809 as the managers of the society, even if such managers had authority to bind the society by an agreement with the feuars, and to remit the cause to the Court of Session to do what is just and consistent therewith. They will by that means have an opportunity of giving such directions in the Court below as they shall think convenient, being consistent with the opinion expressed by your Lordships.

May 25. 1825. fair and proper answer. Accordingly, when the question was put directly to him by the commissioner, he evaded it by referring to his former answer, which was quite unsatisfactory. His Lordship therefore thought that he ought to be examined again, so that in case he had been misled by wrong advice, he might have an opportunity of saying, candidly and honourably, whether he believed that the interest which he now sued for was due. This would not in the least affect the Stamp Acts; because it was quite competent, where there is no legal voucher, to refer to oath. With regard to the unstamped receipts, his Lordship stated, that he was afraid that, under the law as it presently existed, the Court were compelled to shut their eyes against them; but he was not satisfied that the argument of the pursuer, as to the necessity of the receipt of 1818 being on a stamp of 10s., to prove that L. 10 was all that was then due, was well founded. No doubt, where a receipt bears to be in full of all demands whatsoever, it must be on a stamp of 10s.; but this was not a question as to all demands, being one merely relative to prior interest. He thought, however, that some inquiry should be made at the stamp-office on this subject.

Lord Gillies stated, That he firmly believed that the whole interest had been paid; and what was more, he was convinced that the pursuer himself entertained the same belief. If he did not, he would most readily have sworn that he believed that it was due. But he had not ventured to make oath to that effect. If he had not sworn consistently with what was required by law,

Lord Redesdale.—My Lords, The only doubt which has occurred to me upon this case is, whether, as the original proceeding was before the Sheriff, and the Sheriff entertained the subject, conceiving this agreement to be proved by that which is not legal evidence, it may not be necessary, in the order your Lordships pronounce, to have some reference to that proceeding.

Lord Chancellor.—It will be very easy, by altering the concluding terms, to extend it to that. The manner in which it struck me was,—the matter being brought before the Court of Session, this appeal states to us all the interlocutors complained of in the Court of Session, and it is from their interlocutors only that the appeal is brought; if we, therefore, reverse their interlocutors, directing them to do what is right, it strikes me they must then give such judgment upon what the Sheriff had done, as is consistent with what we have done; the noble Lord, however, and myself, will agree upon such words as shall remove all doubt. I would therefore move your Lordships, that this be farther proceeded in on Wednesday.

After some time, the Lord Chancellor said,—My Lords, in the case of *Brown versus Murdoch*, I have, in consequence of what was said by my noble friend, added these words, ‘and with respect to the proceedings before the Court of the Sheriff;’ and with that alteration I suppose your Lordships will agree to this cause being remitted.—Ordered accordingly.

May 25. 1825.

his action could not be sustained; and his Lordship saw no reason whatever for giving him another opportunity of emitting a deposition. He had referred in his oath to his answers to the condescendence, and therefore they must be regarded as part of it; but his statements there and in his oath were at variance. He had endeavoured to shelter himself under some pretended information from Mrs Mitchell, as to an accumulated sum of interest; but his Lordship did not believe that any such information had ever been given; and at all events, it had no relevancy here. The question which was first proposed; and that put by the commissioners, were the proper ones; but they had not been answered, and therefore the action could not be sustained. In regard to the Stamp Acts he concurred with Lord Balgray, but suggested, that as it appeared that the receipts were entered by the pursuer's father in a book kept by Mrs Mitchell, whether, *quoad hoc*, that book might not be regarded as the book of the pursuer's father, and so payment proved scripto of him without the necessity of a stamp; just as if the entries had been made in his own books.

Lord Succoth concurred; and the *Lord President* stated, that in regard to the oath he was of the same opinion with Lord Gillies, and that he saw no reason for allowing the pursuer to emit a second one. The Court, therefore, on the 24th February 1824, pronounced this interlocutor:—‘ In respect of the terms of the pursuer’s oath de calumnia, alter the interlocutor reclaimed against: Find, that by indorsing to the pursuer the receipt for the sums of principal and interest consigned in the Commercial Bank, the defenders have discharged themselves of all claims due in virtue of the bond pursued upon, therefore assoilzie them from the conclusions of the summons; and decern: Find the petitioners liable in expenses of process, and remit to the auditor to tax the account thereof when lodged, and to report.’ By a clerical mistake the ‘ petitioners,’ instead of the pursuer, were by the above interlocutors found liable in expenses; and he having immediately entered an appeal, they presented a petition to the Court on the subject, who ‘ authorized the clerk to correct the error in the interlocutor;’ and thereafter, on the 3d of June, found the appellant liable in the expenses of this petition.*

* See 3. Shaw and Dunlop, No. 69. After the interlocutor correcting the clerical mistake had been pronounced, the appellant applied to the Committee of Appeals for leave to add it to his petition of appeal; but this being objected to by the respondents, and their Lordships, considering that such a correction or variation of a judgment brought under appeal involved a question of competency of great importance, declined

May 25. 1825.

Appellant.—The Court below were not entitled to give any effect to the unstamped documents, and therefore all allusion to them was irrelevant and incompetent. The appellant stands in the situation of a creditor suing for a debt on a liquid document, and consequently it is incumbent on the respondents to prove payment. This they have not done; but they allege that, as they made a reference to his oath of calumny, and he has not sworn in the mode in which they say he ought to have done, they must be assoilzied. There is a manifest distinction between an oath of calumny and an oath of verity upon reference. With regard to the former, the party cannot be examined on all articles that may be set forth in a condescendence, or obliged to depone as to the special grounds of believing or disbelieving all or any of those articles. The sole point to be ascertained is, whether he does or does not believe the statements to be true, which have been found relevant. But the statements of the respondents were found to be irrelevant; and therefore a reference to the oath of calumny was incompetent. Besides, it was plain that the respondents wished to convert it into an oath of verity, which the appellant was entitled to resist; and the answers which he made were those only which could be required from him, and were sufficient to support the action.

Respondents.—Although the question upon the stamp laws was properly introduced as a subject of discussion before the Court of Session, yet, as the judgment appealed against rests entirely upon the oath of calumny, no other question can be argued before this House. Now it is settled law, that a defender is entitled to appeal to the conscience of a pursuer, by insisting that he shall say whether he believes that the facts upon which his claim is rested are true; and it is quite competent to make such a reference, so as to ascertain the belief of the pursuer in his own statement, although that of the defender may have been found irrelevant. But the appellant anxiously evaded the questions which were put to him, and would merely swear, ‘that he believes money to ‘the extent sued for is due;’ thus evading to return an answer

to sanction the act of the Court below, by authorizing the interlocutor to be added to the petition, and left the matter to be disposed of by the House. Accordingly, when it was mentioned at the hearing of the cause, their Lordships stopped the Counsel for the appellant, and called on the respondents for an explanation and justification of the proceeding; and the House not being satisfied, a suggestion was ultimately made from the woolsack, that the farther hearing of the cause should be adjourned, and a recommendation was at the same time given to the respondents to settle the matter, and so have it withdrawn from the notice of the House. In consequence of this, a private arrangement was made under which the respondents paid L.70 of expenses to the appellant, and the hearing of the cause on the merits then proceeded.

to the question, whether he believed that the precise individual debt sued for was due. Having therefore declined to depone that he believes the debt claimed for to be due, the respondents were entitled, according to the law of Scotland, to be assoilzied, and consequently the judgment complained of ought to be affirmed.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutor complained of affirmed, with 'L. 100 costs.'

Appellant's Authorities.—4. Stair, 44. 17.; 4. Ersk. 2. 20.

Respondents' Authorities.—4. Stair, 44. 15. 21.; 4. Ersk. 2. 16.; Act of Sed., Jan. 13. 1692.

MEGGINSONS and POOLE—SPOTTISWOODE and ROBERTSON,—
Solicitors.

Lieutenant-General GEORGE MONCREIFF, Appellant.

No. 27.

WILLIAM TOD and PATRICK GEORGE SKENE, Esq. Respondents.

Entail—Heir and Executor.—An heiress of entail in possession having bound herself and the proprietor, at the end of a lease, to pay certain sums to the tenant for meliorations, but not having constituted them against the estate in terms of the 10. Geo. III. c. 51.;—Held, (affirming the judgment of the Court of Session, with certain variations as to illiquid claims), That the executor of the heiress, and not the succeeding heir of entail, was liable.

ON the 10th of August 1787 Major-General Philip Skene executed an entail of his estates of Hallyards and Pitlour, containing inter alia a prohibition against contracting debt or burdening them with sums of money, under irritant and resolute clauses. At the same time he made a disposition, by which he conveyed to a certain series of heirs all his other estates, real and moveable, which included that of Falkland. In virtue of these deeds his sister, Mrs Helen Skene, widow of Colonel Moncreiff of Reddie, succeeded, in 1803, to the estates, on which occasion she took the name of Skene. The respondent, Patrick George Skene, Esq. was her grandson by her eldest son, and the appellant, Lieutenant-General Moncreiff, was her second son. Part of the entailed estate, called West-Gosperty, was let to the other respondent William Tod, and when his lease was about to expire a new one was granted to him in 1811 by Mrs Skene, who at this time was about 87 years of age. By that lease she set, and in tack

May 27. 1825.

1st DIVISION.
Lord Gillies.

May 27. 1823. ' and assedation let to the said William Tod and his heirs, expressly including assignees, legal, voluntary, or conventional, as also sub-tenants and heirs-portioners, all and whole the farm of Wester-Gosperty, the mill and mill-lands of Burngrange, with the pendicle of Hedderwick, with the multures and sequels, and privilege to the Lomond Hills, conform to use and wont, all as possessed by the said William Tod, and that for all the days, years, and space of nineteen years, from and after the term of Martinmas 1807; which tack the said Mrs Helen Skene binds and obliges herself, her heirs and successors, to warrant to the said William Tod and his forebears, at all hands, and against all deadly.' This tack also contained the following clause:—' Whereas Mr Robert Balfour, architect, St Andrews, General Moncreiff, and Robert Meldrum, factor for the said Mrs Helen Skene, at the desire of the proprietrix, inspected the steading of Wester-Gosperty, they found the tenant was entitled to a new steading, viz. a dwelling-house, barn, and byre, and some repairs to the old steading; that the said Robert Balfour then made out a plan and estimate of said houses; and the same being now executed, and the accounts examined by the said Robert Balfour and Robert Meldrum, they found the same to amount to L.620 sterling. And whereas it was agreed upon betwixt the said Mrs Helen Skene and William Tod, to prevent any dispute anent the obligations on the proprietor for building a new steading, that the said William Tod should advance the foresaid sum of L.620 sterling, upon being repaid the same at the end of his lease, and getting deduction out of his rent of the sum of L.21 sterling for crop 1813, and the like sum yearly for the remaining years of the lease, after said crop; and, in terms of said agreement, the said Mrs Helen Skene binds and obliges herself, or the then proprietors of the lands, at the end of this lease, to pay to the said William Tod, his heirs or assignees, the foresaid sum of L.620 sterling, and that at the expiration of this tack, with interest after the said term of payment till paid, and a fifth part more of penalty in case of failure; as also, the said Mrs Helen Skene binds and obliges herself, and the proprietor for the time being, to allow the said William Tod and his forebears, out of the rent of crop 1813, the foresaid sum of L.21, and the like sum of L.21 yearly during the remaining years of the tack after crop 1813; and in consequence of said agreement the said William Tod binds and obliges himself, and his forebears, to uphold the new dwelling-house, barn, and byre, in a good tenantable condition, and the old steading to be upheld by the

May 27. 1828.

'tenant only for his own accommodation; and whereas the
 'tenant has erected a thrashing-mill and shed, the proprietor
 'hereby becomes bound to take the same on a valuation at the
 'end of the tack; and in case the tenant shall enclose any part of
 'the foresaid lands, he shall be allowed the value thereof at the
 'end of the lease, as shall be ascertained by two neutral men,
 'one to be chosen by each party.' No measures were taken by
 Mrs Skene to constitute any of these contemplated improve-
 ments burdens on the estate in terms of the 10. Geo. III., and
 she died in 1816. She was then succeeded in the entailed pro-
 perty by the respondent Mr Skene, while, in virtue of a deed
 executed by her, the appellant acquired all the other property,
 including the estate of Falkland, subject to various burdens, and
 was nominated and confirmed her executor. Tod having claim-
 ed from Mr Skene, the heir of entail, deduction of the L. 21 out
 of the rent, that gentleman refused it, and intimated that he did
 not consider himself liable to pay either the L. 620 or the value
 of the thrashing-mill, enclosures, &c. A claim was then made
 by Tod against General Moncreiff, as the representative of his
 mother, the granter of the lease, and this having been resisted,
 Tod raised an action against him before the Court of Session,
 concluding that he 'ought and should be decerned and ordained
 'to free and relieve the pursuer of all claim which the said
 'Patrick George Skene has, or pretends to have, to payment of
 'the said sum of L. 21 per annum, allowed by the said tack to
 'be abated or deducted from the rent payable by the pursuer,
 'and of any sequestration, diligence, or action, which the said
 'Patrick George Skene has brought or may bring against the
 'pursuer, for enforcing payment of that annual sum already due,
 'or to become due, in terms of the said tack, and of all the ex-
 'penses attending the same, and other consequences thereof;
 'and further, to make payment to the pursuer, at the expiration
 'of the said tack, of the said principal sum of L. 620 sterling,
 'with a fifth part more of penalty in case of failure, and of the
 'sum or sums he has paid out, or may pay out, in erecting the
 'foresaid thrashing-mill and shed, and in enclosing the foresaid
 'lands, or any part thereof, as the same shall be ascertained,
 'as pointed out in the said tack, at the expiration thereof;
 'and also of the additional value of the lying and going
 'gear of the mill, beyond the inventory and valuation before
 'mentioned, with the legal interest of these principal sums
 'ascertained, and to be ascertained, from the term of Martin-
 'mas 1826, and thereafter in time coming till payment.' In
 defence, General Moncreiff pleaded, that the claim lay only

May 27, 1825. against Mr Skene, the heir of entail in possession, who was deriving the benefit of the lease, and he at the same time brought an action of relief against Mr Skene. Lord Gillies, on the 31st of May 1821, pronounced this interlocutor:—‘ Having heard ‘ parties, conjoins a process of relief at General Moncreiff’s ‘ instance against P. G. Skene, Esq. with this process: in this ‘ process, repels the defences, and decerns against General ‘ Moncreiff, the defender therein, conform to the conclusions of ‘ the libel at Mr Tod’s instance; sustains the defences for P. G. ‘ Skene, Esq. in the process of relief at the instance of General ‘ Moncreiff against him; assoilzies Mr Skene from the conclu- ‘ sions of the libel of relief, and decerns.’ To this judgment the Court (holding that the general point was fixed by the deci- sions) adhered on the 6th of July 1822; and thereafter, on the 14th January 1823, refused a petition, on advising it with answers.*

General Moncreiff appealed.

Appellant.—1. An obligation cannot be extended beyond the meaning and intention of the parties. If a party in express terms excludes the liability of one class of heirs, the person who contracts with him cannot insist for payment or performance from these heirs. But an implied exemption from liability, provided it be fairly deducible from the terms of the obligation, is just as good as an express exemption. Now, in this case Mrs Skene did not bind her heirs, executors and successors, to perform the stipulations in question; she merely bound ‘ the then ‘ proprietor of the lands at the end of the lease;’ an obligation the tenant accepted of, and consequently he could never rely on her executor, who, he must have known perfectly, could not succeed to the entailed estate. It is not incumbent on the appellant to shew who is the tenant’s proper debtor. It is sufficient if he can establish that no liability attaches to himself. But the heir in possession is clearly liable, both in justice and equity. He alone will derive all the benefit arising from the improvements, and consequently ought to pay for them, so far as thereby benefited. The Act of 10. Geo. III. has merely the effect to render the heirs liable whether they are lucrati or not; but at common law, where an heir is lucratus, a liability is affixed to him.

2. Supposing, however, the judgments to be right on the general principle, they are plainly premature, except as to the

* See 2. Shaw and Dunlop, No. 110.

deduction of rent. The L.620 are not payable till the end of the lease, and it is not till that period that any demand can be made for meliorations. But no such claims may exist at that period, and therefore to this extent the appellánt ought to have been assoilzied. May 27: 1825.

Respondents.—1. The obligation undertaken by Mrs Skene was one which could have been enforced against her personally, and consequently can be equally so against her representative. The entail contains a prohibition against contracting debt, or binding the lands with sums of money, and therefore Mrs Skene had no power to do so; and as she did not avail herself of the statute, no claim can be made against the respondent Mr Skene, who does not represent her. Besides, the general question has been settled by a series of decisions, in which the pleas urged by the appellánt, both in law and equity, were repelled.

2. The respondent Tod is entitled to have decree in terms of the libel, although the day of payment is not arrived, execution being of course postponed till the arrival of that period.

The House of Lords ‘ordered and adjudged, that the interlocutor of 31st May 1821 complained of be varied, by leaving out the words, “conform to the conclusions of the libel at Mr Tod’s instance,” and inserting in lieu thereof these words, “conform to those conclusions of the libel at Mr Tod’s instance, by which he claims to be relieved from the payment of the sum of L.21 per annum, and also by which he claims payment from the appellánt, at the expiration of the tack, of the sum of L.620 sterling;” and by inserting after the words, “at the instance of General Moncreiff against him,” these words, “as to the claims last aforesaid;” and by inserting after the words, “libel of relief,” these words, “as to those claims:” And it is further ordered and adjudged, that, with these variations of the said interlocutor of 31st May 1821, that interlocutor, and the other interlocutors complained of, be affirmed; and it is further ordered, that this judgment is to be without prejudice to any claim of the said Mr Tod, at the end of the said tack, in respect of the matters stated in the other conclusions of the libel at his instance, either against the appellánt or any other person; and also without prejudice to any claim of relief by the said appellánt, in respect of the same matters, against the said Patrick George Skene, or any other person or persons.’*

* The judgment now stands thus:—In the process at Tod’s instance against

May 27. 1885.

LORD GIFFORD.—There was a case before your Lordships, to which I shortly called your attention on a former occasion. It was a case, in which Lieutenant-General George Moncreiff, and others, were the appellants, and William Tod, and Patrick George Skene, were respondents.

This was a case, my Lords, in which it appeared that a person of the name of Skene was in possession of estates in Scotland under an entail, in which entail there is the following condition :—‘ That it shall not be lawful to, nor in the power of any of the foresaid heirs, to sell, alienate, impignorate, or dispose the foresaid lands and others, or any part thereof, either irredeemably or under reversion, or to burden the same, in whole or in part, with debts or sums of money.’ It appears that this lady, being thus in possession, granted several leases, and, among others, a lease of lands to a person of the name of Tod; and that lease contains this clause :—‘ Whereas Mr Robert Balfour, architect, St Andrews, General Moncreiff, and Robert Meldrum, factor for the said Mrs Helen Skene, at the desire of the proprietor, inspected the steading of Wester-Gosperty,—they found the tenant was entitled to a new steading, viz. a dwelling-house, barn and byre, and some repairs to the old steading; that the said Robert Balfour then made out a plan and estimate of said houses, and the same being now executed, and the accounts examined by the said Robert Balfour and Robert Meldrum, they found the same to amount to L. 620 sterling:’ it then goes on to state, that it had been ‘ agreed upon betwixt the said Mrs Helen Skene and William Tod, to prevent any dispute anent the obligations on the proprietor for building a new steading, that the said William Tod should advance the foresaid sum of L. 620 sterling, upon being repaid the same at the end of his lease, and getting deduction out of his rent of the sum of L. 21 sterling for crop 1813, and the like sum yearly for the remaining years of the lease after said crop; and in terms of said agreement the said Mrs Helen Skene binds and obliges herself, or the then proprietor of the lands at the end of the lease, to pay to the said William Tod, his heirs or assign-

General Moncreiff, repel the defences, and decern against General Moncreiff, the defender therein, conform to those conclusions of the libel at Mr Tod’s instance, by which he claims to be relieved from the payment of the sum of L. 21 per annum, and also by which he claims payment from the appellant, at the expiration of the tack, of the sum of L. 620 sterling: sustain the defences for P. G. Skene, Esq. in the process of relief at the instance of General Moncreiff against him. As to the claims last aforesaid, assolzie Mr Skene from the conclusions of the libel of relief as to those claims, and decern; but this judgment is to be without prejudice to any claim of the said Mr Tod at the end of the said tack, in respect of the matters stated in the other conclusions of the libel at his instance, either against the appellant (General Moncreiff) or any other person; and also without prejudice to any claim of relief by the said appellant (General Moncreiff), in respect of the same matters, against the said Patrick George Skene, or any other person or persons.

‘ nees, the foresaid sum of L. 620 sterling, and that at the expiration of May 27. 1825.
 ‘ this tack, with interest after the said term of payment till paid, and
 ‘ a fifth part more of penalty in case of failure; as also the said Mrs
 ‘ H. Skene binds and obliges herself, and the proprietor for the time
 ‘ being, to allow the said William Tod and his foresaids, out of the
 ‘ rent of crop 1813, the foresaid sum of L. 21 yearly, during the re-
 ‘ maining years of the tack after crop 1813; and, in consequence of
 ‘ said agreement, the said William Tod binds and obliges himself and his
 ‘ foresaids to uphold the new dwelling-house, barn and byre, in a good
 ‘ tenantable condition, and the old steading to be upheld by the ten-
 ‘ ant only for his own accommodation.’ It then recites, ‘ And whereas
 ‘ the tenant has erected a thrashing-mill and shed, the proprietor hereby
 ‘ becomes bound to take the same at a valuation at the end of the tack;
 ‘ and in case the tenant shall enclose any part of the foresaid lands, he
 ‘ shall be allowed the value thereof at the end of the lease, as shall be
 ‘ ascertained by two neutral men, one to be chosen by each party.’

I ought to have stated to your Lordships, that this was a lease, dated the 5th of November 1811, to this Mr Tod, who appeared to have been in possession of the farm for some years, and it was a term of 19 years, to be calculated from Martinmas 1807. You will see that four years of the term have elapsed; and the situation of the lease in respect of the deduction of L. 21 a-year, in consequence of the tenant having expended the L. 620, was not to commence till after the crop of 1813, being two years after the date of the lease, and six years after the commencement of the term.

My Lords,—Mrs Skene was a very old lady at that time, and she died some years ago; and at her death a gentleman of the name of Patrick George Skene came into the possession of the estate, as succeeding heir of entail. Against this gentleman, as succeeding heir of entail in possession, Mr Tod claimed this deduction of L. 21 per annum, and the performance of the other stipulations contained in this lease. The succeeding heir of entail, not conceiving he was bound to fulfil these stipulations, the respondent, Mr Tod, brought an action against the present appellant, Lieutenant-General Moncreiff, who it appears was the executor of this lady; and in this action he sought that the ‘ de-
 ‘ fender ought and should be decerned and ordained to free and relieve
 ‘ the pursuer of all claim which the said Patrick George Skene has, or
 ‘ pretends to have, to payment of the said sum of L. 21 per annum,
 ‘ allowed by the said tack to be abated or deducted from the rent
 ‘ payable by the pursuer, and of any sequestration, diligence or action,
 ‘ which the said Patrick George Skene has brought or may bring
 ‘ against the pursuer for enforcing payment of that annual sum already
 ‘ due, or to become due in terms of the said tack, and of all the expen-
 ‘ ses attending the same, and other consequences thereof; and further,
 ‘ to make payment to the pursuer, at the expiration of the said tack,
 ‘ of the said principal sum of L. 620 sterling, with a fifth part more of
 ‘ penalty in case of failure, and of the sum or sums he has paid out, or

May 27. 1825. 'may pay out in erecting the foresaid thrashing-mill and shed, and in enclosing the foresaid land, or any part thereof, as the same shall be ascertained as pointed out in the said tack at the expiration thereof; and also of the additional value of the lying and going gear of the mill beyond the inventory and valuation before mentioned; with the legal interest of these principal sums ascertained and to be ascertained from the term of Martinmas 1826, and hereafter in time coming till payment.' Upon this action being brought against the appellant, General Moncreiff brought an action against the respondent Patrick George Skene, the heir of entail in possession of the land; and by that action he claimed to be indemnified against these claims of the tenant. The action came on before my Lord Gillies as Lord Ordinary, who pronounced the following interlocutor:—'Having heard parties, conjoins a process of relief at General Moncreiff's instance against P. G. Skene, Esq. with this process: in this process, repels the defences, and decerns against General Moncreiff, the defender therein, conform to the conclusions of the libel at Mr Tod's instance; sustains the defences for P. G. Skene, Esq. in the process of relief at the instance of General Moncreiff against him; assoilzies Mr Skene from the conclusions of the libel of relief, and decerns.'

My Lords,—That interlocutor was brought under the review of the Court of Session, and they affirmed that interlocutor; so that they have affirmed the decision to which the Lord Ordinary came in that action of relief brought against the respondent Skene by General Moncreiff.

My Lords,—This interlocutor of the Lord Ordinary, confirmed by the Court of Session, has been brought before your Lordships on appeal. My Lords, it is hardly necessary for me to state, that in a case of this nature it is certainly not competent for the heir of entail in possession to erect farm-houses and other buildings upon the farm, and to throw the whole expense of those buildings upon the succeeding tenant of entail, in order to enable the heir of entail in possession, who enjoys this limited interest, to throw any of the expense so incurred upon the succeeding heir of entail. A statute was passed in the tenth year of his late Majesty in aid of heirs of entail in possession, who, by taking certain proceedings pointed out in that Act, may burden the estate of the succeeding heirs of entail with a portion of the expense necessarily incurred, but it can only be such a proportion as is pointed out by that statute. In this instance, Mrs Skene, it appears, had not recourse to that statute, and it is endeavoured to throw upon the executor of Mrs Skene the whole expense of the farm-house. It appears, that the agreement which she made with the tenant was, that a certain rent should be paid, the rent being commensurate to the increased benefit which the tenant derived by the money laid out upon the farm-house; but then she made a stipulation, that she should not pay it herself, but said, You, the tenant, shall pay the L.620, and you shall be repaid that sum at the end of your lease. You shall be paid that sum at the end of the lease by the proprietor;

May 27, 1825.

and to compensate you for the outlay, you shall have out of the rent crop 1813 the sum of L. 21, and the like sum yearly during the remaining years of the tack after crop 1813; in other words, there shall be an annual deduction of rent, or rather of payments, to be made to the proprietor of the land, of L. 21, and which you must consider as the interest of L. 620 from the year 1813 to the expiration of the lease; so that the consequence of that was to throw the whole burden of the expense of the house on the succeeding tenant of entail, and, in the mean time, to throw upon the heir of entail, so long as her possession continued, the interest of L. 620.

In consequence of this, as I have stated to your Lordships, upon Mr Skene refusing to comply with the obligations which Mrs Skene had come under, an action was brought by the tenant against the executor of Mrs Skene, it being contended that that was a debt which Mrs Skene had no power to throw upon the estate, and therefore he, the tenant, had a right to be relieved against the claim by the executor; and he claimed to have it declared by the Court, not only that the executor of Mrs Skene was liable to pay the L. 620, and the L. 21 a-year, but he sought also to have it declared provisionally, that, at the expiration of the lease, the executor of Mrs Skene would be also liable to make good to him the sum or sums he had paid out, or might pay out, in erecting the thrashing-mill and shed, and also the expense of enclosing lands; if any enclosure should be made before the expiration of the lease, as the same should be ascertained. The Court of Session, without distinguishing, as it appears, or without perhaps directing their attention to the particular terms of the action, decerned generally by confirming the interlocutor of the Lord Ordinary. They 'repel the defences, and decern against General Moncreiff, the defender therein, conform to the conclusion of the libel at Mr Tod's instance; sustain the defences for P. G. Skene, Esq. in the process of relief at the instance of General Moncreiff against him; assoilzie Mr Skene from the conclusion of the libel of relief, and decern.'

The decisions, my Lords, on the general point, appear to be conclusive. I have looked at the cases cited, and at other cases, which, as well as the statute, shew the way in which an heir of entail is enabled to throw an expense of this description on the succeeding heir of entail; for without the aid of that statute it might be very prejudicial to all the succeeding heirs of entail, if the heir of entail in possession should not be liable to build farm-houses, if necessary; which he would be hardly inclined to do if the whole expense fell upon him as tenant for life, without throwing part of that burden upon the succeeding heir of entail. That statute of 10. Geo. III. has pointed out the mode in which it is to be done; but this lady has not resorted to the statute, but endeavoured to throw the whole burden upon the succeeding heir of entail.

My Lords,—With respect to that conclusion of the libel which seeks to have it declared that the representative of Mrs Skene shall be

May 27. 1825. liable for L. 620, which is a certain sum, and therefore determined to be debitum in presenti solvendum in futuro, it appears to me, with respect to that sum, as well as the L. 21, the Court of Session have determined rightly in determining in favour of the respondent, and that he is entitled to relief by the executor of Mrs Skene; but with respect to the sum relating to the thrashing-mill, and with respect to the expense that may be incurred relative to the enclosure of the land, it does appear to me quite premature to determine those questions. You do not know, my Lords, in point of fact, whether any enclosure of the lands has been made, and if made, it may become an important question whether made in the lifetime of the late heir of entail, or whether made during the possession of the present heir of entail, who may have looked on and taken advantage of it in his time. With respect to the valuation of the mill, it is a question whether it comes to a certain value. Therefore, my Lords, with respect to this part of the conclusion of the libel, I must confess at present I think a decision would be premature, and therefore that it is quite unnecessary for the Court of Session to determine those questions. An important question may arise upon these points at the end of the lease, between the heir of entail and the executor; but at present it would be premature in me to offer any opinion upon them. It was argued at the Bar, that if the heir of entail in possession suffer tenants to make improvements in his time, of which he will have the benefit, and the exclusive benefit, whether or not, he adopting and suffering them to be made, and taking advantage of them, he may not have to repay those expenses to the tenant: but at present it appears to me quite premature to determine that question, because non constat it may ever arise; for there is no proof before your Lordships that any enclosures have been made. And with respect to the other part, I should recommend to your Lordships to affirm the judgment which decerns against the defender conformably to the conclusions of the libel, relating to the L. 620 and L. 21 per annum; and with respect to the other conclusions of the libel, to suggest to your Lordships the propriety of intimating an opinion, that that question had better be left quite open, supposing the question should ever arise; for it does not follow as matter of course that it will arise. I shall therefore propose to your Lordships a judgment of that nature. It will require some little nicety in penning it; and I should wish to consider it a little before I hand it in to your Lordships, which I will endeavour to do in the course of a few days; but I thought it right to state my view of the case this morning, that the parties interested might be aware of the judgment which I shall ask your Lordships to approve.

Appellant's Authorities.—3. Stair, 8. 1.; Lord Eldon in Queensberry Cases, July 10. 1819.

Respondents' Authorities.—Leslie, March 2. 1779, (15,530.); Dillon, Jan. 14. 1780, (15,432.); Webster, Dec. 1791, (15,430. and Bell's Cases, No. 7. Entail); Taylor, 1792, (No. 8. Entail, Bell's Cases); 10. Geo. III. c. 51.

JAMES ORR and RALPH HARWOOD, Appellants.

No. 28.

HANCE, SON, and WEISE, Respondents.

Composition Contract—Competition.—Held ex parte, (reversing the judgment of the Court of Session), That cautioners and assignees under a composition contract were preferable to creditors acceding to that contract on a fund belonging to the bankrupts, in the hands of a party who, for their accommodation, had drawn bills on the competing creditors, by whom they had been accepted.

PATERSON and HARWOOD, hat-manufacturers in London, were in the practice of employing Peter Morton as their agent in Glasgow; and having got into pecuniary difficulties, they made arrangements with him for raising money by means of accommodation bills. With this view, and by their instructions, he drew bills in their favour on Hance, Son, and Weise, merchants in London, by whom they were accepted and paid. Among other bills were two,—one for L.479. 3s. dated 28d June 1815, and another for L. 294. 17s. dated 24th July 1815. Paterson and Harwood having stopped payment, called a meeting of their creditors on the 11th of September 1815, and the following resolutions were entered into:—‘ It being proposed by Messrs Paterson and Harwood, to pay a composition of 10s. in the pound on their several debts,—9s. in the pound to be secured to the creditors by three bills of exchange, drawn by Mr Ralph Harwood, of Kirby Moorside, Yorkshire, upon and accepted by Messrs Paterson and Harwood, for the amount of 3s. in the pound each, payable at four, eight, and twelve months, and by the promissory-note of Messrs Paterson and Harwood for 1s. in the pound, payable at ten months’ date, the last of the three bills of exchange to have the indorsement of Mr James Orr, of Size Lane: We do agree to accept of the said composition, on all the creditors of Messrs Paterson and Harwood agreeing thereto, and to give a release to Messrs Paterson and Harwood, on all the creditors so coming in, and on the several bills and notes being duly paid, and to execute a proper deed for that purpose; such deed to be prepared at the expense of Messrs Paterson and Harwood.

May 27. 1825.

1st DIVISION.
Lord Pitmilley.

‘ We creditors not having had a sufficient opportunity of satisfying themselves as to the responsibility of Mr Ralph Harwood, his security is accepted only subject to the approbation of Mr Ryle, Messrs Hance and Company, Messrs White, Custon and

May 27. 1825. ' Company, and Messrs Cook and Metcalf, to be signified by their
' first signing the proposed deed.

' Resolved, That the following gentlemen be deputed to obtain
' the concurrence of such bill-holders and other creditors as are
' not now present, to the above propositions, viz. Mr Hance, Mr
' Watt, Mr Metcalf, and Mr Paynter.'

It was alleged by the appellants, that Hance, Son, and Weise,
concurred in these resolutions.

On the 16th of October, (at which time the bill for L. 294. 17s. was in the circle), Morton wrote to Hance, Son, and Weise, in these terms:—' My draft on you for L. 294. 17s. due on the 27th instant, drawn by me by desire of Messrs Paterson and Harwood, and remitted them for their accommodation, I beg to know whether you retain funds of theirs to pay it when due, or that it will return upon me for payment. I am,' &c.—To this they answered on the 19th: ' We are this day favoured with yours of the 16th current; and in reply to its contents beg to apprise you, that Mr Paterson, of the firm of Paterson and Harwood, left here on Sunday last by the smack; and we should presume, that ere this comes to hand he will have arrived at Glasgow, and fully explained to you the situation in which we are placed in regard to your draft for L. 294. 17s. due the 27th instant. Should he however not have arrived, we will state to you the particulars for your guidance. Instead of retaining any funds belonging Paterson and Harwood, we are creditors under their estate to the amount of L. 1600, or thereabouts, for goods and money advanced them; and that certainly without your assistance we shall be placed in a very unpleasant situation; for we cannot, both for your credit and our own, let the bill go back, as we understand from Paterson and Company that you hold back from them funds sufficient for the payment of this acceptance, till you know whether it is paid or not. The better plan will be, for the preservation of our credit, for you to remit us the amount, in order that the acceptance may be duly honoured, or else enable Paterson to do so, and which you may fully rely will be only appropriated to that purpose. However, on this subject we doubt not but Mr Paterson will be able fully to satisfy you.' The bill was retired by Hance, Son, and Weise. On the 11th of November the creditors (including Hance, Son, and Weise). entered into the following agreement:—' Memorandum. It being proposed by Messrs Paterson and Harwood to pay a composition of 6s. in the pound upon their several debts,

May 27. 1824.

secured in the following manner, viz. two shillings at four months, two shillings at eight months, and two shillings at twelve months, in three bills of exchange, drawn by Mr Ralph Harwood, of Kirby Moorside, Yorkshire, upon and accepted by Messrs Paterson and Harwood; the last of the three bills to be additionally secured to the creditors by the indorsement of Mr James Orr, of Size Lane, London, and which bills are to be dated the 22d instant:—We do hereby agree to accept of the said composition of 6s. in the pound, on all the creditors of Messrs Paterson and Harwood agreeing thereto on or before the 22d, (at the same time it being left in the power of Mr James Hance, Mr George Ledger, and Mr R. Heath, to extend the time to a period not exceeding fourteen days, should they deem it advisable); and to give a release to Messrs Paterson and Harwood, on condition of all the bills being duly paid, (but in case either of the three bills shall not be duly paid, each creditor shall be at liberty to proceed against Messrs Paterson and Harwood for the full amount of their respective debts), and to execute a proper deed for that purpose; such deed to be prepared at the expense of Messrs Paterson and Harwood.' A regular deed in these terms was extended, and subscribed by Hance, Son, and Weise; and on the 22d they prolonged the time for obtaining the consent of all the creditors, which was eventually procured.

In December, Hance, Son, and Weise raised an action before the Magistrates of Glasgow against Morton, for payment of the bills for L.479. 3s. and L.294. 17s. drawn by him in favour of Paterson and Harwood, and accepted and paid by Hance, Son, and Weise, on the allegation that they had done so without having received any value from Morton. On the other hand, Paterson and Harwood, (in whose right the appellants, as assignees, now stood), founding on a holograph account by Morton, brought an action also before the Magistrates, for payment of a balance of L.620. 1s. 1½d.; so that, in this way, a competition arose between Hance, Son, and Weise, and Paterson and Harwood, for the fund which Morton admitted to be in his hands, and which the Magistrates ordered to be consigned. In the latter of these processes appearance was made by Hance, Son, and Weise, and after conjoining them, and a great deal of procedure, the Magistrates pronounced this judgment:—'Find, that the comparers (Hance, Son, and Weise) have declined adducing any further proof: Find, that in the special circumstances of the case, as appearing from the admissions of parties, and the written evidence adduced, the comparers have not established any claim

May 27. 1825. ' against the defender Morton personally, on the ground of the
 ' bills in question having been drawn by the defender, and ac-
 ' cepted by the compearers for the defender's accommodation ; or
 ' of the defender having indirectly derived benefit from the ac-
 ' ceptance by the compearers of the said drafts ; or of the de-
 ' fender having thereby virtually interposed his credit or guaran-
 ' tee for the pursuers, or otherwise, so as to render the defender,
 ' the drawer of the bills, liable to the compearers, the acceptors ;
 ' or so as to render the defender liable to the compearers for the
 ' debts of the pursuers ; and to entitle or bind the defender to
 ' retain the funds which he formerly held belonging to the par-
 ' suers, and which are now in medio, in relief of his own engage-
 ' ments, or of the engagements of the compearers on account of
 ' the pursuers. Farther find, that, in the circumstances of this
 ' case, as appearing from the admissions of parties and the written
 ' evidence adduced, the compearers have not established any pre-
 ' ferable claim to the said funds which the defender formerly held,
 ' and which are now in medio in a competition with the other
 ' creditors or assignees of the pursuers, through the medium of
 ' the said bills, drawn by the defender, and accepted by the com-
 ' pearers, or by the use of legal diligence, or otherwise ; and ap-
 ' pear also to be precluded from insisting in any such preferable
 ' claim by the arrangement which the pursuers are stated to have
 ' made with their creditors, and to which the compearers are
 ' stated to have been parties. Accordingly, prefer the assignees
 ' of the pursuers to the funds in medio, reserving to the com-
 ' pearers their right to prove, and to be ranked *pari passu* on the
 ' estate of the pursuers. Further, find the defender seems to be
 ' entitled to expenses, inasmuch as he was interpellated from pay-
 ' ing the funds in medio to the pursuers or their assignees, by the
 ' action against him at the instance of the compearers. And, be-
 ' fore issuing any order with regard to the payment of the funds
 ' in medio, remit to the auditor to tax the defender's expenses.
 ' Finally, find that, in the circumstances of the case, there do
 ' do not appear to be sufficient grounds for subjecting the com-
 ' pearers in the expenses occasioned by their urging a preferable
 ' claim to the funds in medio.'

Hance, Son, and Weise, having advocated, the Lord Ordinary pronounced this interlocutor:—' Finds, that the defen-
 ' der, Peter Morton, was bound to relieve the advocates of
 ' the engagement which they came under, by accepting and
 ' retiring the two bills in question, drawn by him upon them,
 ' without value, for the accommodation of the defender and

‘ of Paterson and Harwood, for whom he acted as agent : Finds, May 27. 1825.
 ‘ that the said defender was bound to retain in his hands, and
 ‘ thereafter to remit to the advocates, the funds which came in-
 ‘ to his possession belonging to Paterson and Harwood, in pay-
 ‘ ment of the bills which had been accepted by the advocates,
 ‘ trusting to the security of these funds, and to the defender’s hold-
 ‘ ing goods of Paterson and Harwood sufficient to pay the bills
 ‘ which he drew on the advocates : Finds, that the advocates are
 ‘ not barred from insisting in their claim on the money which was
 ‘ consigned by order of the Magistrates, or in their claim against
 ‘ the defender, Peter Morton, arising out of the nature of their
 ‘ transactions, and out of the correspondence between them, by
 ‘ the alleged arrangement with the creditors of Paterson and
 ‘ Harwood.’ Thereafter, his Lordship decerned in terms of the
 libel at the instance of Hance, Son, and Weise, and ordained
 the consigned money to be paid to them. To these interlocutors
 the Court adhered on the 8th December 1820, and 9th February
 1821.*

Orr and Harwood, assignees of Paterson and Harwood, ap-
 pealed ; but no case was lodged by the respondents.

Appellants.—The funds in the hands of Morton belonged to the
 bankrupts, Paterson and Harwood. Hance, Son, and Weise,
 were creditors of the bankrupts, and had no right to any pre-
 ference over these or any other funds belonging to them. They
 acceded to the composition contract, and have received payment
 in terms of it ; and by that accession they discharged all claim
 on the funds. But the appellants were the cautioners under the
 composition contract, and as such received an assignation in relief.
 They alone, consequently, are entitled to the fund in question.

The House of Lords ordered and adjudged, ‘ that the inter-
 ‘ locutors complained of be reversed ; and the Lords find, that
 ‘ the appellants, James Orr and Ralph Harwood, assignees of
 ‘ Paterson and Harwood, are entitled to the funds in medio :
 ‘ And it is further ordered, that the cause be remitted back to
 ‘ the Court of Session, to do further therein as shall be consistent
 ‘ with this judgment, and as shall be just.’

E. PARTON,—Solicitor.

* Not reported.

No. 29. WILLIAM and ALEXANDER COOPER and Company, Appellants.

JAMES KERR, (MEEK'S Trustee), Respondent.

Relief.—Pactum Illicitum.—Certain parties having agreed to defray the expenses of a prosecution at the instance of a procurator-fiscal, and taken active measures in support of it; and having alleged, that in the course of the proceedings they had disclaimed them; and the procurator-fiscal having been subjected in expenses and damages on account of the prosecution; and the Court of Session having found him entitled to relief,—The House of Lords so far affirmed the judgment as found him entitled to relief, but remitted to hear farther as to the amount of the expenses and damages, and as to the liability of the parties subsequent to the date of the alleged disclaimer.

May 31. 1825.

2D DIVISION.
Lord Glenlee.

ON the 6th October 1809, Thomas Meek, procurator-fiscal of the Justice of Peace Court for the Under Ward of Lanarkshire, presented a petition to the Justices, founding on the 28th Geo. III. ch. 17. for the regulation of the manufacture of nuns or ounce thread, by which it is declared, that in reeling or making up that kind of thread, the manufacturers should make use of reels of certain dimensions, and have a certain number of threads in each hank, under the penalty of the reels being destroyed; and of being subjected to any party who should inform upon them in the penalty of L.10 for each pound weight; and setting forth, that several manufacturers (among whom he included the appellants, Cooper and Company) had been guilty of a violation of the statute, and therefore praying for warrant of search, and, on conviction, for payment to him of the penalty. It was alleged by Meek, that the true object of the proceeding was to ascertain whether a thread, called Dozen or Lisle thread, fell under the statute; that the petition had been suggested by several manufacturers of nuns thread, (among whom were the appellants); and that they had verbally agreed to indemnify him, before it was presented, for the whole consequences. This was denied by the appellants, who referred, in support of their denial, to the circumstance of their names having been included in the petition. It however appeared, that on the 10th of October they, with certain other manufacturers, subscribed the following agreement, and that no proceedings were followed up against them:—‘ We agree jointly each to bear a proportion of the expense and trouble in making a legal trial, whether Dozen and Lisle thread can be brought in as an evasion of the Act of Parliament for preventing frauds in the manufacture of nuns or ounce thread. (Signed) WM. and ALEX. COOPER and Company, G. BELL and

‘SON, MATTHEW SHAW, ROBERT SHIRRA, WALTER URE, JOHN WALKER and SON, ROBERT EASTON.—Glasgow, 10th October 1809.’ A warrant had in the meanwhile been obtained against all the parties complained of, which, it was alleged by the appellants, was subscribed only by one Justice, whereas it ought to have been by two. The warrant was executed only against two of the parties, Mitchell and Company, and John Harper, manufacturers in Glasgow, in whose possession thirty pounds of thread were seized. In defence they stated, that it was Dozen or Lisle thread, which was essentially different from nuns or ounce thread, and therefore did not fall under the statute. A great deal of procedure then took place before the Justices; and on the 11th September 1810 a meeting of the subscribers of the agreement was held, (of which John Ronald, one of the partners of the appellants’ house, was preses), the minutes of which set forth, that they were ‘subscribers of an obligation to pay the expense attending the making a legal trial, whether Dozen and Lisle thread is an evasion of the Act of Parliament for preventing fraud in the manufacture of nuns or ounce thread;’ that Mr Meek stated to the meeting, that, on the employment of the persons before-mentioned, and in consequence of the foresaid obligation, he had commenced a prosecution against Messrs Thomas Mitchell and Company, and John Harper, thread-manufacturers in Glasgow, for reeling and putting up Dozen and Lisle thread different from the mode pointed out by the foresaid Act of Parliament; that actions of damages had been raised against two of the subscribers by Harper, and by Mitchell and Company, and that the meeting resolved to send one of their number to Paisley, to ‘try whether or not he can get any assistance towards the expense of carrying on these prosecutions from the trade there,’ and that two others should do the same in Glasgow. Two days thereafter a report was made to another meeting, at which Meek was not present, when ‘they unanimously resolved to proceed in the prosecution before the Justices, and instruct Mr Meek to do every thing in his power to bring the same to a speedy and successful issue. They farther direct him to defend the action of damages before the Court of Session, and in general to do every thing in all the prosecutions which he may consider necessary. In witness whereof, this minute is signed by John Ronald, preses, in presence and by appointment of the meeting. (Signed) JOHN RONALD.’ At last, on the 1st September 1812, the Justices found, that the seizure of the thread was warranted, so as to form evidence in support of

May 31. 1825. the complaint; but that it did not fall under the Act of Parliament, and therefore ordered it to be restored, and found Meek liable in expenses. The case was then brought before the Court of Session by mutual advocations; but, before they were passed, Shirra, one of the subscribers, on the 17th October addressed to Meek this letter:—‘I have perused the interlocutor pronounced by the Justices of the Peace for the county of Lanark in the process at your instance, as procurator-fiscal of said county, against Messrs Thomas Mitchell and Company and John Harper, relative to nuns or ounce threads, and I am determined, so far as I am concerned, to rest satisfied with the judgment as it stands; and I beg leave, therefore, to intimate to you, that from this date I will be at no farther expense in the matter, nor consider myself liable to you for any, should you think proper to proceed farther in said process.’ The advocations were thereafter passed, that at the instance of Meek on caution, in which Ronald became the cautioner, and at the same time got an obligation of relief subscribed by the appellants and the other parties, with the exception of Shirra and Easton. In that obligation they stated, that the process was ‘carried on by him (Meek) at our desire,’ and that they reserved their relief against Shirra and Easton, ‘subscribers of an obligation for paying the expenses of carrying on the said process.’ After a great deal of litigation (in the course of which, as was averred by the respondent and not denied by the appellants, one or other of these parties attended the consultation of counsel and the advisings of the cause) the Court affirmed the judgment of the Justices on the 27th May 1814, in so far as it found that the thread did not fall under the statute, and ordered it to be restored, and decerned against Meek for L. 739 of expenses. Against these judgments an appeal was entered by Meek to the House of Lords.

During the dependence of this appeal, an action was, in February 1813, raised in name of the appellants, and certain of the other subscribers, against Bell and Shirra, for relief; and it being alleged that Bell was in *meditatione fugæ*, a petition was presented to the Magistrates of Glasgow, in which the appellants made oath to the verity of their claim in the action of relief, and their belief of Bell’s contemplated flight, in consequence of which he was ordained to find caution. On the 12th of May 1815, however, their agent wrote to the agent for Meek, that the action against Bell and Shirra was instituted without their knowledge and consent, and that they disclaimed it.

Actions of damages having been brought against Meek by Harper, and Mitchell and Company, and he having transmitted to Ronald, the partner of the appellants, some of the papers, Ronald, on the 22d May, answered, that neither 'I, nor the other gentleman you refer to, conceive that they have any interest in the proceedings, and that therefore any communication to us on the subject was unnecessary.' Thereafter, Meek having sent to him copies of the appeal cases, Ronald, upon 2d September 1816, wrote to him, 'I received your packet of this date, enclosing the appeal cases for the appellant and respondent in the thread cause to which you allude, and which I return; as I have no concern with them, and will not so much as read them.' The appeal was afterwards discussed, and the judgment affirmed, with costs. An action was then brought by Meek against the appellants, and the other subscribers of the obligation of the 10th October 1809, in which he set forth, that they 'did, upon 6th October 1809, or prior thereto, enter into an arrangement to prosecute the manufacturers of such thread, and they employed the pursuer for that purpose, engaging to defray the expense, and to relieve him of all consequences: that they entered into the written obligation of the 10th of that month, which they delivered to him: that on the faith of it, and by their instructions, he carried on the prosecution, whereby, and by the obligation before recited, as well as by sundry prior and subsequent acts and deeds, the said defendants, parties to the said obligation, are bound, jointly and severally, to sustain and defray the expenses incurred or to be incurred in carrying on the proceedings at the instance of the pursuer, and defending the said actions raised against him; and also to free and relieve the pursuer of all damages and expenses awarded, or which may be awarded against him, in any of the foresaid actions, or in any proceedings arising therefrom, or connected therewith; and he therefore concluded against them; conjunctly and severally, for relief accordingly. In defence the appellants stated, that so far from having employed Meek; he had actually included them as defenders in the petition: that although it was true no proceedings were taken against them; and they subscribed the agreement of 10th October, yet this was not an obligation in favour of Meek, who had subsequently got possession of it under a false pretence: that he had a deep interest in the result of the proceedings, because he was entitled to a penalty of L.10 on every pound weight of thread which should be condemned; and accordingly, although one pound was

May 31. 1825.

May 31. 1825.

sufficient to try the question, he had seized upon thirty: that it was true that they had attended the meetings, but the minutes were concocted *ex post facto* by Meek, and did not express what actually occurred: that he had committed various irregularities during the course of the proceedings; and that supposing the agreement of the 10th October 1809 was to be considered as available to him, still, as the parties merely bound themselves jointly, and not severally, it came to an end by Shirra's disclaimer prior to the advocacy, and, at all events, by the subsequent disclaimers of Ronald: that on the same supposition the obligation could not be enforced, because being in favour of a public prosecutor, it was *pactum illicitum*; but if it were a legal obligation, it only created a *pro rata* liability; and as Meek had himself a pecuniary interest, he was bound to bear his share of the loss. The Court, on the report of the Lord Ordinary, and Meek being now dead, and Kerr being sisted as trustee for his creditors and representatives, pronounced this interlocutor:—

‘ Find, that the defender Robert Shirra can, in any event, be
‘ only found liable in expenses and damages incurred anterior
‘ to the 17th day of October 1812, being the date of his letter
‘ to the late Thomas Meek; and, *quoad ultra*, assoilzie the said
‘ Robert Shirra from the conclusions of this action, and decern;
‘ and, before answer, appoint the pursuer to put in a minute
‘ stating the late Mr Meek's interest in the original action libelled
‘ on, and the extent of the penalties under the statutes which might
‘ have arisen to him as pursuer in the said action for penalties re-
‘ ferred to in the pleadings, in the event of his proving successful.’

Thereafter they pronounced this judgment:—‘ They sustain the
‘ action at the pursuer's instance, and find that the representa-
‘ tives and creditors of Thomas Meek, and their trustee, are en-
‘ titled to relief from the defenders of the expenses and damages
‘ stated in the libel; but that, on account of the private interest
‘ which Thomas Meek had in the statutory penalties sued for in
‘ the original action before the Justices, find, that he was liable
‘ *pro rata* with the other defenders in a share of such expenses
‘ and damages, and that the pursuer is accordingly bound to re-
‘ lieve the defenders to the extent of such share: and find, that
‘ Robert Shirra is only liable in a share *pro rata* with the other
‘ defenders and Thomas Meek of such part of these expenses and
‘ damages as were incurred previous to the 17th day of October
‘ 1812, and decern and declare accordingly; but find no ex-
‘ penses due to either party.’ The respondent having reclaimed,
their Lordships, on the 24th June 1823, pronounced this inter-

locutor:—‘ They vary and alter the interlocutor reclaimed May 31. 1895.
 ‘ against, to the effect of finding that the petitioners are entitled
 ‘ to a total relief from the defenders of the expenses and damages
 ‘ stated in the libel, and of finding that the petitioners are en-
 ‘ titled to the expenses of this action, subject to modification ;
 ‘ but, quoad Robert Shirra, adhere to the interlocutor reclaimed
 ‘ against, and refuse the desire of the petition : Allow an account
 ‘ of the expenses of this process to be put in, and remit the same,
 ‘ when lodged, to the auditor of Court to tax and report ; reserv-
 ‘ ing to the defenders to be heard before the Lord Ordinary as
 ‘ to their disclamation of the proceedings in the advocacy, and
 ‘ the period at which such disclamation was made, and on the
 ‘ effect thereof on the claims libelled, and to the petitioners their
 ‘ answers thereto ; and remit to his Lordship to do therein as he
 ‘ shall see cause.’*

Cooper and Company appealed.

Appellants.—1. The proceedings before the Justices were at the sole instance of Meek, who had a pecuniary interest to insist in them ; and although, no doubt, the appellants and other manufacturers entered into an arrangement, inter se, for the purpose of relieving each other of any expenses they might incur in relation to the prosecution, yet as it was neither addressed to, nor granted in favour of Meek, it could not be available to him.

2. Supposing, however, that he was entitled to found upon it, the obligation was pactum illicitum. By the law of Scotland, popular actions are prohibited, and therefore any arrangement for supporting such an action is contrary to law, but more especially where it is alleged, that it has been made in favour of a public officer, whose duty it is to prosecute all offences on his own responsibility alone.

3. In the course of the proceedings numerous irregularities were committed by Meek ; and on the supposition that he is to be regarded as their agent, it is not just that they should be bound to relieve him of the consequences thence arising. But, at all events, if the agreement is to be available to him, it can only be enforced according to its terms. The obligation, however, was merely joint, and not several, and so came to an end when Shirra withdrew. It was terminated by the disclaimers sent by Ronald, one of the appellants ; and if a joint liability is to be imposed on

May 31. 1903. the appellants, the respondent, as representing Meek, should be subjected in his share of the loss.

Respondents.—1. The evidence is quite conclusive to establish the fact, that the proceedings were truly at the instance, and for the benefit of the appellants and the other subscribers: that they employed Meek to raise and prosecute them, and that they bound themselves to relieve him of all the consequences.

2. It is absurd to characterize the obligation as *pactum illicitum*. It is the daily and recognized practice in Scotland for public prosecutors to take obligations of relief where offences are prosecuted at the request of private parties: accordingly, this is well known with regard to indictments on behalf of banks at the instance of the Lord Advocate against parties accused of forgery; and indeed, if inferior public prosecutors were not allowed so to protect themselves, it would be impossible for them to prosecute numerous offences, because they are frequently subjected personally in expenses and damages.

3. No irregularities were committed, and none are established to have existed.

4. Independent of the obligation of October 1809, the acts of the appellants were sufficient to constitute against them a joint and several liability; and as the prosecution was adopted for their behoof, they are bound to relieve the respondent of all the consequences. The retirement of Shirra cannot be of any avail to them, and the only letter of Ronald that can be founded upon was not written till the whole expenses had been incurred, and the liability for damages had arisen.

The House of Lords found the respondent entitled to relief
 ‘ from the appellants and the other defenders jointly and severally,
 ‘ (except as to Robert Shirra, as to whom it has been found that
 ‘ he is only liable in a share pro rata with the other defenders of
 ‘ such part of the expenses and damages as were incurred previous
 ‘ to the 17th October 1812), for the expenses and damages in-
 ‘ curred and paid by Meek and the respondent in and about the
 ‘ proceedings in the libel mentioned, (the same to be ascertained
 ‘ and modified by the Court of Session); subject, however, to this
 ‘ reservation, that is to say, reserving to the appellants and the
 ‘ said other defenders to be heard upon the amount of such ex-
 ‘ penses and damages, and also upon the disclamation by them
 ‘ of the proceedings in the advocacy, and of the appeal to the
 ‘ House of Lords, and the period at which such disclamation was
 ‘ made, and on the effect thereof on the claims subsequent to such

‘disclamation; and to the respondent, his answer thereto. And May 31. 1825.
 ‘it is ordered and adjudged, that the several interlocutors complained of, so far as they are inconsistent with this finding, be
 ‘reversed: And it is further ordered, that the cause be remitted
 ‘back to the Court of Session, to proceed further according to
 ‘this judgment, and as shall be just.’

Respondents' Authority.—2. Hume on Crimes, 132.

J. BUTT—J. CAMPBELL,—Solicitors.

Sir ANDREW CATHCART, Appellant.

No. 30.

EARL OF CASSILLIS, and Others, Respondents.

Service—Consolidation—Exhibition—Re-hearing.—Thomas having in 1748 executed a deed of settlement of his estates, and of those to be acquired by him, containing a simple destination, and procuratory of resignation in favour of his brother David, and the heirs of his body; whom failing, certain other substitutes; whom failing, his own nearest heirs whatsoever; and the superiority of part of the lands being separated from the property, and having, after making up titles to the superiority, and, in order to consolidate it with the property, given a commission to a third party, who granted to him a charter of confirmation of the base right, and a precept of clare constat for the specific purpose of consolidation, on which he was infeft; and having thereafter purchased certain parcels of lands, on which he was infeft; and for political purposes granted a procuratory of resignation for new infeftment of the greater part of the lands included in the deed 1748, to himself, his heirs and assigns, in fee, on which he expedite a charter in 1774, but did not take infeftment; and having died without issue, and been succeeded by David, who obtained a general service to him ‘tanquam legitimus et propinquior hæres masculus et ‘lineæ,’ and been infeft on the precept in the charter of 1774; and David having thereafter executed an entail in favour of a series of heirs, exclusive of the heirs whatsoever of Thomas, and died without issue; and the intermediate substitutes under the deed 1748 having failed, and the heir whatsoever of Thomas having brought an action of exhibition against the heir succeeding in virtue of the entail, and a reduction of the titles made up by David, and of the entail;—Held, (affirming the judgment of the Court of Session), 1. That the service of David to Thomas was effectual to convey to David the personal right of all the subjects specified in the settlement 1748, and contained in the charter of 1774, and entitled him to execute the entail, but not as to lands not included in the charter of 1774: 2. That the terms ‘heirs and assigns’ under the charter of 1774 did not necessarily imply the same heirs as those called by the deed of 1748: 3. That (without deciding the point of consolidation) as Thomas was vested in the personal right both of the superiority and property, that right was transmitted to David by his service: But, 4. A remit made to consider, whether the right to the lands which had been acquired by Thomas subsequent to the deed 1748, and not contained in the charter 1774, could be transmitted to David by the above service: 5. That the entail was sufficient to exclude the heir of Thomas from insisting in an exhibition of the previous titles: And, 6. That a party who had an opportunity of being heard at the Bar of the House

of Lords on poists incidentally noticed in his printed case, and on which judgment was given, although he alleged he was not heard, was not entitled to a re-hearing.

May 31. 1823.

Lords Justice-
Clerk MacQueen,
Armadale, and
Craig.

GILBERT, Earl of Cassillis, was proprietor of the estates of Cassillis and Culzean, the former of which was entailed on the same heirs as the peerage, but the latter was held by him in fee-simple. In 1569 he conveyed Culzean to Sir Thomas Kennedy, who, after some intermediate generations, was succeeded by his descendant, Sir John Kennedy. Sir John had three sons—John, Thomas, David; and three daughters—Elizabeth, Anne, and Clementina. John, the eldest son, succeeded his father in Culzean. His sister Elizabeth married Sir John Cathcart of Carleton, Baronet, and was the mother of the appellant, Sir Andrew Cathcart. After making up titles to Culzean, John, in January 1743, executed a disposition and deed of settlement, containing a procuratory of resignation which he executed in April thereafter, ‘in favour of myself and the heirs-male of my body in fee; whom failing, the heirs-female of my body, the eldest succeeding without division; whom failing, Mr Thomas Kennedy, my immediate younger brother-german, and the heirs-male of his body; whom failing, Mr David Kennedy, my youngest brother-german, and the heirs-male of his body; whom failing, the heirs-male procreated of the marriage between Sir John Cathcart of Carleton, Baronet, and the deceased Dame Elizabeth Kennedy, his spouse, my eldest sister-german; whom failing, Mrs Anne Kennedy, spouse to John Blair of Dunskey, my second sister-german, and the heirs-male of her body; whom failing, Mrs Clementina Kennedy, my youngest sister-german, and the heirs-male of her body; whom all failing, my nearest lawful heirs and assigns whatsoever.’ This deed was registered in the books of Council and Session July 31. 1747; but the destination was not fortified by any prohibitory clause. On the death of his brother, Thomas (afterwards called Sir Thomas, and thereafter Earl Thomas) obtained a general service as heir of line and provision to him. In January 1748, and before Thomas had vested in himself any feudal title, he executed a disposition and deed of settlement, containing a procuratory for resigning the lands and all others which he should acquire, ‘to and in favour of myself, and the heirs-male of my body; whom failing, to David Kennedy, my only brother-german, and the heirs-male of his body; whom failing, to Mr David Kennedy, advocate, my uncle, and the heirs-male of his body; whom failing, to Mr

May 31. 1825.

‘John Kennedy of Kilhenzie, advocate, and the heirs-male of his body; whom all failing, to my own nearest heirs whomsoever; the eldest heir-female and her descendants, so oft as the succession devolves upon females or their descendants, excluding still all others from being heirs-portioners, and succeeding always without division throughout the whole course of succession, so as that the right of primogeniture shall take place among the female heirs in like manner as the same does among male heirs.’ The property of part of the estate, viz, the lands of M’Gowanston, Mill of Drumgirloch, Dunnymuck; and Whitestone, being separated from the superiority, Thomas made up titles to them in this way:—He got himself vested in the superiority by a charter and infeftment, proceeding on his own and his brother’s procuratory of resignation, and having then granted a commission to Hugh Crawford, writer to the signet, for establishing in him proper titles, Mr Crawford granted to Thomas a charter of confirmation and precept of clare constat, as nearest and lawful heir of Sir John Kennedy, who was last infeft in the base fee, to the ‘effect that the right of property of the same, which stood in the person of the said John Kennedy, may be consolidated with the right of superiority of the said lands, mill, and others, standing in the person of the said Sir Thomas Kennedy, and the rights of property and superiority remain inseparable for ever hereafter in the person of him and his heirs-male and of provision, to whom the same are or shall be limited by any disposition thereof, granted or to be granted by him.’ Thomas was accordingly infeft in terms of this precept; the instrument of sasine bearing, that this was done for the purpose of consolidating the property with the superiority, so that the same might remain inseparable in all time coming. In February 1757 he also expedite a crown-charter to those parts of Culzean held of the Crown, in virtue of his brother John’s procuratory of resignation, and that in his own disposition, on which he was infeft. Under this infeftment were included the barony of Greenan, forming part of the estate of Culzean, and the lands of Balvaird, which he had purchased. He was also infeft in the lands, holding of the Earl of Cassillis, under a precept of clare constat from the then Earl, as heir of the person who had been last infeft in them. In 1759 he succeeded to the estates and honours of Cassillis. Between 1764 and 1771, he purchased the lands of Enoch, Daljarbrie, Portmark, Polmeadow, certain tenements in Maybole, and teinds, from Crawford of Ardmillan, and was infeft on the

May 31. 1886. dispositions by the purchasers, to him, his heirs and assignees. In 1764 he granted for political purposes five feu-rights of five separate parcels of the barony of Greenan to his brother David, who was infest; and at the same time he gave five wadsets of the corresponding superiorities to his law agent, redeemable by him, his heirs and assignees. On the procuratories contained in these wadsets, crown-charters were expedite, and assigned to five political friends, who were infest; and then his brother David reconveyed to him the feus, on whose precept Thomas (now Earl Thomas) was infest. In 1774 the Earl granted a procuratory of resignation for new infestment in the estate of Culzean, (but which did not include Greenan, or Enoch, and the other lands which he had purchased), to himself, 'his heirs and assignees whatsoever.' On this he expedite a crown-charter to himself, 'et hereditibus suis et assignatis quibuscunque;' and about the same time, with the view of creating additional votes, he executed a feu-right in favour of his brother David, who was infest in June of that year. Earl Thomas then assigned the crown-charter to his political friends in liferent, who were infest; but quoad the fee no infestment was then taken, the precept remaining unexecuted. His brother David then reconveyed the dominium utile to him, his heirs and assignees whatsoever; and Earl Thomas, in virtue of his disposition, was infest. He died in 1775 without issue, and was succeeded by his brother David both in the honours and estates of Cassillis and Culzean. Earl David then made up titles to Culzean by a general service as 'legitimus et propinquior heres masculus et lineæ dicti quondam Thomæ, Comitis de Cassillis, sui fratris germani;' took infestment on the unexecuted precept contained in the crown-charter of 1774; and considering himself to be thus vested in the superiority, granted in his own favour a charter of confirmation of the base right which Earl Thomas had executed in his favour, and of the reconveyance to the Earl, and a precept of clare constat for infesting himself in the lands, on which he was infest. After this, and with the view of consolidating the property with the superiority, he granted a procuratory of resignation ad remanentiam of the lands holding of the Crown, except Greenan, on which resignation followed. With regard to Greenan, he, as immediate superior, granted a precept of clare in his own favour, as heir of his brother, and was infest. In 1788 he executed an entail of Culzean, similar to that of Cassillis; and in 1790 made another, by which he disposed the estate to himself; whom failing, to Captain Archibald Kennedy, (who was, under the entail of Cassillis, entitled to succeed to the honours

May 31. 1825.

and estates of Cassillis), and to his heirs-male; whom failing, a series of other substitutes. Earl David died on the 18th December 1792, at which time the entail had not been published. On the supposition that no such deed had been executed, the appellant, Sir Andrew Cathcart, (the son of Elizabeth, sister of Earl David), by the failure of the other substitutes, was entitled to succeed to Culzean, as one of the heirs-portioners and of provision under the procuratories of resignation by John in 1743, and by Earl Thomas in 1748. When, therefore, the repositories were about to be opened, he claimed right to the possession both of the house and title-deeds of Culzean. This was resisted on the part of Archibald, now Earl of Cassillis, whose agent stated, that for security he had deposited the entail in the hands of the Keeper of the Records in the General Register House, and he produced the scroll of the deed. The appellant's agent not being satisfied, an arrangement was made, by which the repositories were opened, the deeds cursorily examined, and again shut up, and the keys placed in the hands of Thomas Kennedy, Esq. of Dunure, to be kept by him 'until the said Lord Cassillis's settlements are examined, and it 'is thereby ascertained who is to have the custody of the title-deeds.' This was accordingly done; and the entail, together with an opinion of Counsel that Earl Archibald was entitled to the deeds, having been exhibited to Mr Kennedy, he delivered the keys to his Lordship, who thereupon took possession of the title-deeds.

Sir Andrew then brought an action of exhibition *ad delibendum* against Earl Archibald, and certain trustees named by Earl David, and of damages against them and Mr Kennedy of Dunure, in which, after founding on his right as heir-portioner, of line, and of provision, to John, Thomas, and David, he set forth, 'that the pursuer, in consequence of the 'right which he unquestionably had, by virtue of his apparen-
'cy, 'to a full and unlimited inspection of the repositories of his an-
'cestors, and especially in respect of the facts and circumstances
'before specified, which took place on opening the repositories
'at Culzean, and of the letters and proposals which afterwards
'passed at Edinburgh relative to that business, did repeatedly
'desire and require the several defenders before-named, to ex-
'hibit to him the whole writs, title-deeds, and securities made,
'granted, or conceived, to or by his said predecessors, with all
'other writs and documents regarding the estates, heritable and

May 31. 1825. ' moveable, of his said predecessors, in order that he might have
 ' an opportunity of deliberating upon the nature and extent of
 ' their succession, and the propriety of his entering thereto in
 ' the respective characters aforesaid; yet the said defenders not
 ' only refused so to do, but the said Thomas Kennedy of Dunure
 ' took upon himself to deliver up to the said Lord Kennedy, or
 ' others acting in his name, the whole keys of the said reposi-
 ' tories, which had been deposited in his hands for the behoof of
 ' those having a right and interest therein, and that without giving
 ' the pursuer an opportunity of being heard for his interest;
 ' and the said whole title-deeds, and other writs and documents,
 ' are now in the possession of the said several defenders before-
 ' named, or one or other of them.'

The summons therefore concluded, that the defenders should be ordained to produce ' the whole title-deeds, &c., and all other
 ' writs and obligations, of whatever kind or denomination, which
 ' they, or any of them, have in their possession and custody,
 ' made, granted, and conceived by or in favour of the pursuer's
 ' predecessors above-named, or any of them, or their predeces-
 ' sors, with all inventories of the title-deeds of their lands and
 ' other writings, and all adjudications or other legal diligence
 ' deduced against their estates, and all other writings relative to
 ' the estates, heritable and moveable, which pertained to them
 ' respectively;—' to the effect that the pursuer may have access
 ' thereto, and full inspection thereof, in order to his deliberating
 ' upon the nature and extent of the succession which has now
 ' opened to him in consequence of the death of his ancestors
 ' before-named; and may be enabled to judge, whether it is
 ' proper and expedient for him to enter and represent his said
 ' predecessors as heir of line or of provision to them respectively
 ' before-mentioned.'

There was also an alternative conclusion, failing such exhibi-
 ' tion, that the defenders should be found liable in the ' damages
 ' sustained by him through the improper and unwarrantable
 ' conduct of the defenders, or any of them, in withholding or
 ' putting out of the way writings in which the pursuer has so
 ' deep an interest.' In defence it was pleaded, that as Sir
 Andrew's right was completely excluded by the entail made
 by Earl David, the action was incompetent; and in regard to
 the claim of damages, that Mr Kennedy had correctly per-
 formed the trust committed to him, which was only to endure
 till the nature of Earl David's settlements should be ascertained.

Lord Craig, on the 14th December 1793, assoilzied the respondents, and to that judgment the Court adhered on the 4th of February 1795.* May 31. 1823.

Thereafter, Sir Andrew granted a trust-bond to his agent, Mr Blane, writer to the signet, who, with the view of adjudging the estate of Culzean, and in order to try the question of right, brought a reduction of the titles made up by Earl David, and the entails executed by him, as inept.†

In support of the action, Sir Andrew, by his trustee, contended,—

1. That as Earl David never made up a title as heir of provision, in terms of the disposition by Thomas in January 1748, he remained a mere apparent heir of the lands in question; and by a well-known rule of law, had no power gratuitously to alter the destination, to the prejudice of the heirs thereof: That this objection applied to all the lands in dispute, but particularly to certain parcels, (which, in the course of the discussion, were styled the ‘pendicles,’) viz. the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements in Maybole, and teinds, conveyed by Crawford of Ardmillan, which had been acquired by Earl Thomas by purchase subsequent to the deed of 1748, and were not included in that of 1774.

2. That although Earl Thomas had, in order to extend his political influence, passed the charter of 1774, containing most of the lands in question, in favour of himself, his heirs, and assignees, that charter was not intended to alter the previous settlement of the estate, which had been made by the deed 1748, and could not have that effect; that the terms, heirs and assignees, in the charter 1774, being flexible, must be understood as of the heirs of the destination in the deed 1748; and that, at all events, the service of Earl David, as heir-male and of line to Earl Thomas, could not connect him with the charter 1774, as it was necessary to be served heir of provision under the deed which regulated the succession.

3. That even supposing Earl David had, by his service as nearest and lawful heir-male and of line, effectually vested himself in the right of the charter 1774, still that charter, with regard

* See *Morr.* 3993.

† Although this action did not form the subject of the present appeal, yet, as it gave rise to several important questions, of which there is no connected report; and as the reporters have been favoured with notes of the opinions of the Judges, they have been induced to present a full report of the case.

May 31. 1825. to certain lands, (M^cGowanston, &c.), carried nothing but the naked superiority, which had been separated from the property, and the two estates of property and superiority never were consolidated in Earl David's person by the known legal method of resignation ad remanentiam, but remained separate estates,—the charter of confirmation and precept of clare constat being insufficient to consolidate them; that therefore the deeds under challenge could only apply to the superiority, and not to the property, which consequently was not conveyed by these deeds, but, upon the most favourable supposition for the respondent, still remained in hæreditate jacente of Earl David, and were descendible to Sir Andrew Cathcart under the destinations of 1743 and 1748.

To this it was answered,—

1. That though Earl David's general service was not per expressum a service as heir of provision under the disposition 1748, yet, as it sufficiently demonstrated Earl David to be necessarily, and to the exclusion of all others, the person called to the succession by that deed, it was sufficient by the law of Scotland, as fixed by a series rerum judicatarum, to carry the whole personal rights which stood under the disposition 1748, just as effectually as if the general service had found Earl David to be the nearest and lawful heir-male and of line, and heir of provision, under the disposition 1748. And further, that the personal right to the lands of Enoch, Portmark, Polmeadow, tenements in Maybole, and teinda, were carried by Earl David's general service, as connecting him with the deed 1748 conveying all subjects to be acquired by Earl Thomas.

2. That whatever object of conveniency, whether connected with political operations or otherwise, might have induced Earl Thomas to expedite the charter 1774 in favour of himself, and his heirs and assignees, contrary to the terms of the disposition 1748, the latter charter must be held to have altered the former destination, and to have devised the estate to the heir of line; that there was no power in the Court, upon the supposed flexibility of the word 'heirs,' and upon vague imaginations as to the probable intention of Earl Thomas, to give any effect to the charter 1774, other than that which the technical terms employed legally imported: That besides, were the Court entitled to take such liberties with the deeds of individuals merely ex presumpta voluntate, there was no reason for believing that Earl Thomas, in expediting the charter 1774, meant to use the words 'heirs and assignees' in any other sense than that

of heirs whatsoever: That however this question might stand, it would have no effect to invalidate Earl David's general service, as a proper title to connect him with the charter of 1774; because, whether the words 'heirs and assignees' were to be construed according to their usual meaning, or as controlled by the terms of the disposition in 1748, it was clear that the most unexceptionable service which Earl David could expedite, in order to take up the subjects contained in the charter 1774, was one in the precise character to which that charter conveyed the subjects, viz. the character of heir of line—the destination which alone a disposition to heirs and assignees imports. And, therefore, the service completely took up the subjects in the charter 1774, whatever question might arise as to whether Earl David was to hold the subjects affected by the settlement 1748,—a matter of nothing more than mere speculation, or, at least, one which could only have occurred had Earl David died intestate. For, as the settlement 1748 contained no prohibition to alter the order of succession, and Earl David having altered it by the settlements under reduction, it became no longer of any consequence whether the charter to heirs and assignees was, or was not, to be controlled by the settlement 1748.

3. That with regard to the want of consolidation, it was a matter of no consequence, since both the property and superiority being vested in Earl David, his settlements conveyed them both, and every other right that was in him, with equal effect, whether separate or consolidated; but the proper and correct mode of consolidating had been adopted.

Lord Justice-Clerk, (Braxfield), on 13th May 1797, pronounced this interlocutor:—' Finds, that Earl David's service ' as heir-male and of line to his brother Earl Thomas, necessarily established him to be heir under the settlement 1748: ' but, 2do, et separatim, finds, that the settlement 1748 was ' alterable by Earl Thomas at pleasure: And in respect that, ' by the disposition 1774, executed by Earl Thomas, and charter ' following thereupon, a considerable part of the lands in dispute stood devised to Earl Thomas, his heirs and assignees, ' finds, that Earl David's said service did effectually carry the ' right of superiority of these lands, as established by the foresaid ' charter, and that the precept of clare granted by Earl David ' in his own favour, with the infeftment thereupon, did effectually ' carry the property: Finds, that it is of no importance in this ' question whether the property was consolidated with the superiority or not in Earl David's person; for although, in a ques-

May 31. 1825.

May 31. 1825. 'tion of succession ab intestato, these lands, without consolidation, would be considered as two separate estates, descendible to different heirs if so devised, yet as both property and superiority were effectually vested in Earl David's person, so any deed of conveyance of these lands executed by him would carry every right and title he had in the lands, whether of property or superiority; and therefore, upon the whole, repels the reasons of reduction as to the whole of the lands contained in the disposition 1774; repels also the reasons of reduction as to the whole of the other lands and tenements in dispute, except as to the tenements of Maybole, the lands of Portmark and Polmeadow, the teinds contained in the conveyance by Mr Crawford of Ardmillan, the lands of Enoch and Daljarbrie, as to which desires to hear parties farther; and with the foresaid exceptions, assoilzies the defenders, and decerns.'

Sir Andrew's trustee having lodged a representation, and the cause having been afterwards remitted to Lord Armadale, during the Lord Justice-Clerk's indisposition, his Lordship, upon advising it, with answers, pronounced this interlocutor on the 22d January 1799:—'Refuses the desire of the representation, and adheres to the interlocutor pronounced by the Lord Justice-Clerk, in so far as respects the lands contained in the disposition 1774 executed by Earl Thomas, and infeftment following thereon; but with respect to the lands of Portmark and Polmeadow, finds, that Thomas Earl of Cassillis was infeft in these lands, upon the dispositions granted by the persons from whom he acquired right to them, and that he died infeft therein: Finds, that the lands of Portmark and Polmeadow were not comprehended in Earl Thomas's dispositions 1774, and charter thereon following, nor in any personal deed or conveyance executed by him, either in his own favour or in favour of Earl David, posterior to the infeftment taken by him in these lands upon the original disposition thereto: Finds, that Earl David's general service was insufficient to vest in him any right or title to these lands of Portmark or Polmeadow, in which Earl Thomas died infeft; and that no title to these lands was made up by Earl David, that enabled him to carry these lands to the defender, and to disappoint the right of Sir Andrew Cathcart; and therefore, quoad these lands of Portmark and Polmeadow, sustains the reasons of reduction, and reduces, decerns, and declares accordingly.' Thereafter his Lordship, on advising mutual representations, pronounced the following interlocutor:—'Alters that part of the interlocutor, of date 22d January

‘ 1799, which finds that Earl David had no sufficient title in
 ‘ him to these lands of Portmark and Polmeadow: Finds,
 ‘ that Earl Thomas’s disposition in 1748, in favour of his
 ‘ brother David, conveyed not only the lands therein specially
 ‘ enumerated, but also all the other lands which the said Earl
 ‘ Thomas should thereafter acquire; and that Earl David’s gene-
 ‘ ral service in 1776 was sufficient to establish his right as heir
 ‘ under the disposition in 1748; and therefore adheres in toto to
 ‘ the interlocutors pronounced by the late Lord Justice-Clerk,
 ‘ of date 13th May and 29th June 1797; refuses the desire of
 ‘ the representation for the pursuer; assoilzies the defender from
 ‘ the whole conclusions of the libel, and decerns.’

May 31. 1825.

Sir Andrew’s trustee having reclaimed, the Court, on the 15th January 1800, ‘ found, that David Earl of Cassillis, by his gene-
 ‘ ral service tanquam legitimus et propinquior hæres masculus et
 ‘ linæ to his brother Earl Thomas, carried right to the unexe-
 ‘ cuted precept in the charter 1774, and did thereby vest in him
 ‘ a sufficient personal right to the lands therein contained; that
 ‘ as Earl David was heir to his brother, as well by the special
 ‘ destination contained in the deed of settlement executed by
 ‘ Earl Thomas in 1748, and the charters following thereupon,
 ‘ as by all the other titles and investitures in the person of Earl
 ‘ Thomas, it is unnecessary to determine the question, whether
 ‘ the special destination was altered or not by the charter 1774,
 ‘ the general service being, in all events, sufficient in point of
 ‘ form to connect him with the lands contained in that charter,
 ‘ or in any similar titles; and so far adhere to the interlocutors
 ‘ reclaimed against; but ordain the parties to give in memorials
 ‘ upon the other points of the cause, and particularly upon the
 ‘ question of consolidation, respecting the lands of M’Gowan-
 ‘ ston and others, and upon the question, whether the general
 ‘ service was sufficient to connect Earl David, as heir of provi-
 ‘ sion under the settlement 1748, with the different parcels of
 ‘ land which were acquired by Earl Thomas.’ *

* *Morr.* 14,447. The following Notes of the opinions when the above judgment was pronounced were taken by James Ferguson, Esq. Advocate:—

President.—The first point is the validity and effect of Earl David’s general service to his brother Earl Thomas.

Lord Justice-Clerk thinks the effect of the charter 1774 of Earl Thomas as importing an alteration of the destination of the investiture 1748, and therefore, as a question which may prejudice the other, ought to be first considered.

Lord Justice-Clerk.—*1st Point.*—Clear, in the first place, That Earl Thomas held the whole estate in fee-simple: 2dly, That he never limited the powers of his heirs. In-

May 31. 1825.

Sir Andrew's trustee having reclaimed, and memorials having been lodged, the Court, on the 15th January 1801, adhered; and

deed, he expressly conveyed to Earl David a fee-simple of the whole estate. Will not now go into the nice distinctions as to the history and form of the titles of the different parcels. A general service will vest a right to expedite titles to all personal rights which have devolved upon the person served in the character established by the service. If service does not describe exactly the character in which all the estates may be taken, but establishes these by implication, it is a question of intention how and to what extent a person served may apply his service. The jury find the facts proven to them, which may establish an additional character as heir beyond that specified in the brief or claim. The jury here have found that Earl Thomas died without issue; that Earl David was his only lawful brother living. Clear, then, that Earl David was heir-male of his brother; and this is also established by the service. Also that he was heir of line. Not in the service described as heir of provision, but called by charter 1748 in the very case of devolution found to exist by the service, viz. as heir-male of his brother Thomas on his death without issue. Can it be argued that David's right was to be set aside, because, though his service established every fact which proved every character of heir and every right of succession to unite in his person, yet it did not specify one of those characters as heir arising from the facts proven and sworn to?

3d Point.—Besides, charter 1774 clearly, in his Lordship's opinion, an universal settlement. Political purposes might be the reason for chusing the time to execute this settlement, but will this qualify or invalidate the settlement? A procuratory of resignation then granted by Earl Thomas of his whole estate. This the best and most usual mode of making a new settlement or entail. Charter thereon expedite to 'heirs and assignees whatsoever.' Can this be carried back by implication, and restricted to the terms of a former investiture? and can these terms be limited because not the same with the terms in investiture 1748, which might be altered at pleasure, and had been partially at least altered before? Had infeftment followed on this charter 1774, could an heir have served in special as heir of the prior investiture 1748 afterwards? As no infeftment followed on the charter in 1774 before Earl Thomas's death, a general service of Earl David alone could take up the personal right of this charter. Where was the obligation on Earl David to go back from the last incomplete title of 1774, which was a catholic title, and only wanted infeftment, to the prior more limited titles? Earl David completed this catholic title *habili modo* by service, carrying the procuratory, &c. and then by infeftment. Nothing to bar him from doing so. No prohibitions, restrictions, irritancies or limitations in the former titles of Earl Thomas, which could found a challenge against the title completed on resignation 1774 followed by the charter. It is said, that the term 'heirs whatsoever' in charter 1774 may be interpreted or restricted to mean the heirs of the investiture 1748. Accessory rights may be carried by *presumpta voluntas*; but the term 'heirs whatsoever' is a technical phrase, perfectly understood, and, when the only destination used in the investiture of an estate, must bear its own meaning, and receive the weight due to that meaning.

Lord Meadowbank.—Of the same opinion.

Lord Craig.—Of the same opinion.

Lord Hermand.—The second point in the order of the petition is prejudicial to the first. This noticed in the answers. Thinks the order of the answers is the best. Speaks therefore first as to the second point. Charter 1774 not a total settlement. Did not include lands holden of a subject, some of the most valuable parts of the estate, Greenan barony, Maybole tenements, &c. It has been argued, that the terms heirs and assignees in a partial settlement, must be interpreted according to the destination in a

further found ' the general service of Earl David sufficient to convey the subjects not contained in the charter 1774,' and assoilzied

May 31. 1825.

prior general settlement. Case of Rose, but for specialities, would have been so decided. For the truth of this refers to the argument in that case, and to the President's recollection. Thinks it extremely questionable whether charter 1774 can be regarded as importing an alteration of the destination in the investiture 1748. Doubts on second point also. David Earl of Cassillis's service, if it is to be regarded as equivalent to a service under charter 1748, then it refers to that investiture in toto; and suppose the competition here between a daughter of Earl Thomas, or a son of David Kennedy, the uncle of Thomas and David Earls of Cassillis, or of John of Killeenzie, and a stranger disponent of Earl David, could they or any of them set aside such a service as Earl David's? Thinks the question might merit serious discussion. Names will not alter the principles of law or their application. Considers it improper for him to go into argument.

President.—If any thing turns on alteration or non-alteration of settlement 1748, I am of opinion that it never was altered, and at Earl Thomas's death remained a standing investiture of the estate. Ready to give reasons for thinking so, but thinks it not essential to the cause at present. Will consider, 1st, The effect of general service expedited by Earl David at the death of Thomas. This service comprehended every general character that Earl David could possibly have. Whether investiture 1748 altered or not altered by devise in charter 1774, the words heirs and assignees in that devise, technically mean the very same thing as *legitimus et propinquior haeres*, the words in the service. These last are strengthened by the addition of the words, *masculus et linea*. Perfectly clear, that Earl David having in him every character as heir in every sense, of provision, and heir-male, and of line; the service must be therefore good as applying to the character in the charter 1774 of the heirs called by that charter, whether it altered investiture 1748 or not. A different question, whether when so served and invested, David must give effect to the investiture 1748. He would have been obliged to do so, if that a tailie. If there had been competing heirs when he was served, or heirs having interest to require him to make up his titles under the investiture 1748. There were none. No person could shew an interest to require that he should make up his titles under investiture and destination 1748 by any action. He had in himself every title and character of heir of every kind when he was served. The precise same rule in judging of Earl David's service, applies in so far as regarded his own right and title to the parts of the estate not in the charter 1774; for example, as to the barony of Greenan; feu-rights granted of that estate before the 1774; by the feu-rights that barony devised to the heirs of the destination 1748. The reconveyances of these feu-rights expressly refer in some cases to that investiture. Some of these reconveyances also, are *hereditibus et successoribus quibuscunque*. A charter obtained, and continuing unaltered, may change the former settlement and destination of an estate held in fee-simple, though not followed by infestment, but revokable till the death of the person who obtains it. Case of Rose was decided on special circumstances, which fully proved the intention. It was there laid down, that a political charter did not alter the investiture; and although against my client, I approved, as I do approve, of that doctrine. Charter 1774, according to the evidence of intention which exists, was not meant to alter the destination 1748. That, however, does not affect the consequences of the general service of Earl David, as vesting the whole estate and prior rights and titles thereto in him. Every right was thereby carried to him which existed; still, however, this does not exhaust the whole cause. Suppose that the rights in his person still remained separated and distinct. His settlement might not convey all these. As to some parcels, not clear: I would wish to hear and to read something more. Question of con-

May 31. 1825. *in toto*.^{*} Sir Andrew's trustee having reclaimed, in regard to the question, whether the service carried the lands contained in the

solidation, respecting M'Gowanston and two other parcels. There a base infestment of preceding owner was in the way when Earl Thomas expedite his charter to the superiority. No resignation ad remanentiam was used. The consolidation was attempted by confirmation, and by declaring in the charter of confirmation his purpose of consolidating. Decision in the case of Buchanan and Bald settled the point, that there could be no consolidation without a resignation ad remanentiam. A go-by is given in the answers to this point. William Buchanan of Drummakill did precisely in that case what has been here done, and the consolidation not being affected, his disposition was ineffectual to his daughter, and the succession lost by that mistake, by the solemn decision in that case as to a very valuable property, the dominium utile of the estate. There never was a consolidation in this case. The dominium utile, therefore, in hereditate jacente of Earl Thomas. But this point is not yet fully explained. Should go to the Ordinary. The interlocutor shews that the point has not been argued so as to point out the application of the legal principles to the titles of this property to the Judge. At present, doubts if, in point of fact, even Earl David's service carried both property and superiority of these parcels.

Sol.-Gen. (Blair, for Lord Cassillis).—Both property and superiority, whether consolidated or not, of these parcels, contained in investiture 1748; and therefore carried by service of Earl David. If that service had the effect of taking all that was in investiture 1748.

President.—At present I am of opinion, that the service does not connect with the purchases, nor with the special destination 1748, independently of the intermediate charter and disposition. Dominium utile of M'Gowanston, if not consolidated, and the purchases, stand on the footing of charter 1748. If these were only to be taken up on the footing of the conveyances from the purchasers, then a special service was necessary. There was a general right in charter 1748, which might have been the subject of an adjudication, and therefore of a general service. But the general service expedite by Earl David, in its general characters does not necessarily include a special character. A general service never found to connect with a particular investiture without reference to it; so found in the case in papers of Edgar. At present inclines to think, therefore, that the general service does not carry purchases, nor dominium utile of M'Gowanston. January 1706, Livingston; 14th December 1796, Calder against Ellison. There might have been two Davids.

Lord Bannatyne of opinion, that charter 1774 not an alteration of investiture 1748; and therefore that the destination of that investiture still regulates the succession.

Vote put by the President,—Does the general service of Earl David carry right to all the subjects devised to heirs and assignees?—That it does, Lords Justice-Clerk, Polkennet, Armadale, Balmuto, Craig, Stonefield, Ankerville, and Meadowbank.—Not, Hermand and Bannatyne.

Found unnecessary to determine whether the settlement 1748 is altered by charter 1774.

N. B.—Lord Glenlee being one of Earl David's trustees, did not vote; and Lords Dunsinnan, Methven, and Cullen, were not present.

^{*} The following notes of the opinions were taken by Lord Advocate Dundas, Counsel for the Earl of Cassillis:—

Justice-Clerk.—Deed 1748 gives estate nominatum to Earl David,—an unlimited settlement, and in fee-simple, both adquisita et adquisenda. Deed 1774, although

disposition of 1748, or other titles, and not in the charter of 1774, the Court, on the 26th May 1801, after a hearing in presence, and May 31. 1825.

for making votes, a good investiture. Resignation the most formal and complete mode by which a man infeft in lands can reinvest them for the purpose of settling succession. Must judge only *ex facie* of the procuratory and subsequent charter following thereon. His service as heir-general to Thomas took up every personal right; and last substitution in deed 1748 being to heir and assignee, David, though not named nominatim before, took up the estates *habili modo* as heir and assignee whatever. His subsequent settlements, therefore, good. Had deed 1748 preferred different persons to Earl David, might have been some doubt as to the service. Only question is, was there a proper feudal title made up or not in the person of David? Thinks there was, and that subsequent settlements good.

Hermad.—Import of service the main question. If material to consider service in case admitted by Justice-Clerk of different persons being called from Earl David, cannot think it immaterial here. Charter 1774 made no alteration.

Armadales.—One point, not stated before him as Ordinary, implied prohibition, but nothing in that case. If Earl David's title to Earl Thomas connected him properly with his brother and the estates, then the settlements are good. Earl David thought he had done so, and meant to do so. Settlement 1748 was one of the settlements with which David was to connect as the governing settlement; and, second, the charter 1774. If at Earl Thomas's death any question could have occurred from the state of the family between heir-male and heir-line of Thomas, then agrees with us, that necessary to have attended to the distinction. Clear that no alteration intended by Earl David of the investitures; but then he was heir to his brother, and to the estates in every character, and in his power to have taken up succession either as heir of 1748 or of 1774, or of both, just as he pleased and chose. Instances daily occur of different estates belonging to a defunct, which stand to heirs-male, of entail, or line. Now, if heir is heir to all these estates in each character, he may do it in any form he chooses, most unquestionably by general service. But no doubt true that some lands contained in 1748, which not contained in deed 1774; and question as to these, if title 1776 connects with these. Understands, on force of decisions quoted in case, that if character appears from general service to be truly in the heir, although not correctly expressed, that is sufficient; and interlocutor of Braxfield, 13th May 1797, is therefore good. If it is necessarily implied from service that heir is not only of line, but also male and of entail, that is perfectly sufficient, and he will take conquest, entail, and every thing which truly belongs to him, though that not expressed. Unnecessary, too, to take notice of the particular deed under which any such heir is rendered male, of provision, conquest, entail, &c. Not sure if it would not be proper that a general invariable rule had been established to the contrary, and obliging heirs of provision to notice the deed and state the character; but finds no such rule which will entitle him to say, that if service as heir of line implies service as heir-male, that it shall not also imply heir of provision. A general service has no immediate relation to lands. It only establishes the character, through and by means of which the heir served generally may afterwards connect himself with lands. No danger of extending the doctrine of implication to heirs of provision, because he could only take up after a general service the particular lands specified in the deed by which he is constituted heir of provision, and no more.

Decisions in *Menzies*, *Dalhousie*, *Haldane*, support the general doctrine above laid down. The other decisions not contradictory, because in these services it did not appear *ex facie* of the service that the other character implied. Refers to and quotes the service of Earl David as actually expressing him to be only brother-german of

May 31. 1825. advising memorials, found, ' that the general service of David
' Earl of Cassillis, *tanquam legitimus et propinquior hæres mas-*

Thomas, who died without issue or heir-male, and that he is of course both heir-male and of line. What more necessary? Not surely required to produce the deed by which heir is rendered either heir-male or provision, as found in case of Linplum.

Hernand.—Difficulty here, that if Armadale's doctrine good, then, if no title at all made up, if it truly appear that he is *de facto* heir, this sufficient. Denies that proposition—*quod potuit non fecit*. Cases of Reid and of Fairservice, Court thought, though both characters in the heir serving, yet that this held insufficient. One of these cases was a man heir both of line and of marriage, yet the service set aside. Thinks that Thomas did not mean by charter 1774 to alter investitures of estates; but clear from the circumstances under which the charter was obtained, that not Earl Thomas's intention to do as in case of Kilravock. Then if deed 1748 not altered, a very important and difficult question indeed—recommends attention to Mr Ross's Memorial, which is a lecture on law of services. Material and radical distinction between services as heirs of law, line, male, and conquest, which are definite, and which require no particular deed to be produced to instruct them, and may therefore be necessarily implied from the words insert in claim to jury and verdict, as was the case in Orr's case and in Haldane's case; but widely different where case is of service as heir of provision or entail, and impossible to imply that character, unless deed stated or produced on which that indefinite character is founded. Production of deed perhaps not necessary, as found in the case of Linplum. But there he claimed as heir of provision. Now, had deed 1748, or any other deed, been produced, making David heir of provision, would have agreed with Earl Cassillis; or even if it had necessarily appeared that he claimed as heir of settlement 1748, or any other settlement, would have been inclined to agree; but neither of these the case. Illustrates by hypothetical cases in petition, where David might not have been heir of provision or line. This service would not have interrupted prescription of the settlement 1748 as to decisions, unless implied or necessary; cannot admit it, and so found in case of Reid against Woods. Agree with Haldane's case as if necessary implication, and same nature is case of Orr. Here no such necessary implication,—indeed impossible.

Meadowbank.—Notwithstanding able memorial, remains of opinion with interlocutor: concurs entirely with Armadale. Denies Hernand's distinction between services as heirs-male, or line, and heirs of provision. Service 1776 clearly sufficient to take up the deed 1748; and therefore adheres.

Notes were also taken by Thomas W. Baird, Esq. Counsel for Sir Andrew; and as those of Lord Meadowbank's opinion are fuller than those by the Lord Advocate, they are here given:—

[Was formerly of opinion with the interlocutor of Lord Ordinary, and is so still; coincides in every thing with Armadale; only doubts whether, as stated by that Judge, it would be better in practice to require production of deeds of provision, and to mention them in the service. Has no inclination to draw the matter tighter than our ancestors did service of the country; that he who has the substantial right should have the power of disposal, and his settlements not to be disappointed 'by a swirl of the law.' A service as heir-male the same as heir-male of provision. The latter necessarily inherent in the former. A decree of declarator, finding that Earl Thomas had died without heirs of body, would have transferred right to Earl David, called *nominatim* by deed 1748. No difficulty in finding the service sufficient to take up that deed.]

'culus et lineæ of his brother Earl Thomas, was not a service as heir of provision under the settlement 1748, and consequently is not sufficient to carry the subjects in question, which are not

May 31. 1825.

Bannatyne.—Alters his former opinion, and thinks the title proper.

Craig.—Two separate points. 1st, Is title good on charter 1774? Thinks it a good investiture hereditibus, &c. and enters not as to question for what purpose it was done, and therefore service good. This supports interlocutor as to all subjects contained in deed 1774. As to 2d question, a very general and important one; and in spite of all he has heard, must concur with Lord Hermand, and for altering quoad all lands not contained in the charter 1774.

President.—Has had no difficulty in the cause, except the last spoken to by Lord Craig, and even as to that would have had none but for the interlocutor of Lord Justice-Clerk. But thinks he will prove that this a mistake, and that not his opinion. As to implied prohibition, a joke. As to consolidation, that decided in case of Drumakiln; but that as an end by positive prescription. As to lands contained in 1774, clear that Earl David's service did most evidently connect him with that charter. Thinks deed 1748 never altered till by deed of Earl David; but different question whether a title good or no, and question whether succession altered or not; for if David had left a daughter, clear that distant heirs-male would have taken under settlement 1748 in preference to the daughter, because Earl David had not done any thing in his lifetime to alter the succession.

Memorial for pursuer argues most ably the important question here at issue. Amounts to a mathematical proposition. Clear that service as heir-general never can include a service as heir of provision. Sorry for the law of Scotland, and irremediable consequences inextricable to settlements of landed property, if the contrary held to be law. Explains Braxfield's first interlocutor, where preliminary words have that impression, but concluding words reserve for hearing the question as to lands, to which alone this great question can relate. Besides, in the very late case then depending, Braxfield decided the very reverse in the identical same circumstances. Case of Forbes, in p. 58. of Earl Cassillis's memorial. In that case Braxfield set out with approving of Haldane's case, on the very grounds stated by Lord Hermand,—necessary implication; but thought differently in Forbes's case, because no such necessary connexion or unavoidable implication between heir of line and heir of provision. Most dangerous, indeed, and destructive of feudal law of Scotland, if to go into doctrine of supplying characters by remote circumstances not appearing ex facie of service, and necessarily arising from it. Braxfield at that moment had case of Cassillis depending before him.

Asks if it would have been possible for David under this service to have served heir in special to the lands contained in 1748? Clear that it required a service as heir of provision to carry the lands. That not done, and therefore these still in hereditate jacente of Thomas. (This opinion goes clearly to give Sir Andrew, Portmark, Polmeadow, Enoch, and Maybole, which stood clothed with infeftment in Earl Thomas's person to heirs of provision). If Earl David had not made his settlement, inclines to think with Hermand, that heirs in deed 1748 would have succeeded. Title and rule of succession very different things in law.

Justice-Clerk.—Thinks he sufficiently connected himself with the personal right in deed 1748.

Adhere.—Armadales, Justice-Clerk, Cullen, Bannatyne, Ankerville, Stonefield, Polkessmet.

Alter.—President, Hermand, Craig, Dunsinnan. Glenlee did not vote.

May 31. 1825. ' contained in the charter 1774; sustained the reasons of reduction
 ' as to these subjects, and remitted to the Lord Ordinary to pro-
 ' ceed accordingly.* Their Lordships afterwards explained,
 ' that the meaning of the Court in pronouncing the interlocutor
 ' 26th May last was to find, that Earl David's general service was
 ' not a service as heir of provision to connect him with the settle-
 ' ment in 1748, or with any similar deed of provision or settlement,
 ' and consequently was not sufficient to carry the subjects which
 ' were specially provided by any such deed, and which were not
 ' contained in the charter 1774, or in any other title-deed or
 ' charter of a similar nature: Find, that the lands of Enoch and
 ' Little Enoch, the lands of Portmark and Polmeadow, and
 ' tenements of Maybole, and the teinds conveyed by Crawford
 ' of Ardmillan, were of this description, and were not carried to
 ' Earl David by the said general service; but that all the other
 ' lands in question were so carried.

* The following Notes of the Opinions were taken by Matthew Ross, Esq. Counsel for Sir Andrew:—

Herrmand.—An important question of law here occurs, though perhaps, in the circumstances of the case, it will not affect any extensive property. The question is, whether the general service of 17th April 1776 is a good service as heir of provision? The consequences of the interlocutor as it stands would be alarming. A succession may be fixed upon a man which he never thought of, and of course all its passive consequences. In place of Earl David's taking up the character of heir of provision under the deed 1748, by the general service of 17th April 1776, there is every appearance that the deed 1748 was industriously rejected by him, whatever his motive might be for so doing. But the question is, has he connected himself with the deed 1748, let reason of his conduct be what it may? It appears to me he had not. Put this case:—Suppose there had been different dispositions; one in 1748, and another of a different date and tenor, with clauses inconsistent, and a different destination; will it be said, that both could be carried by the general service, and that by the service which makes no mention of any deed, or of any service in the character of heir of provision, the person serving would become heir under both the contradictory deeds? and if not, under which would he be held to be heir? There is no safety but in adhering to principle. Conjectures are not to be regarded. It is said, that in expeding a general service as heir of line, the heir cannot foresee the extent of the obligations he may incur by such service. But, for that very reason, I will not put any construction upon a service that may give it more extensive effects than it necessarily must bear. Earl David well knew the deed 1748, but never did any act importing an intention to take it up. It was said every man may judge how to make up his titles. But the inference from this is against the defender. It follows the more clearly, that therefore the Court cannot, and ought not to judge for him; but he ought to declare explicitly his own intention. *Animus adeundi* necessary. If a claim necessary, can a man otherwise than as he does claim? It was said it was enough that party has a right to be served. This contrary to all my ideas of the law of service. The decisions are consistent and agreeable to principle. In case of Haldane, the true character implied necessarily. Case of Livingston against Menzies the only exception. This clearly erroneous, and never followed.

The Earl having then reclaimed, the Court, on the 16th May 31. 1825.
November 1802, pronounced this judgment:—‘ Find, that Earl

Meadowbank.—Have heard nothing to make me alter my opinion. As the Lord President viewed the case differently, I should wish his Lordship to deliver his opinion.

President.—I have a fixed opinion; but I do not wish to break in on the usual order in delivering it.

Meadowbank.—I agree with the pursuer that the true character must be expressed or implied in the service. But I think the true character, that is, a service in character of heir of provision, was implied in the service in question. A service as *heres masculus* is a service, not as heir of law, but as heir of provision; and here the character of heir of provision is implied in the service as heir-male. I consider it the same as if heir of provision had been expressed. The case of two settlements was put by Lord Hermand. I answer, that supposing a man is served heir of provision generally, this is undoubtedly good; yet the same difficulty would have occurred to settle to which deed the service applied. I think your Lordships must determine whether the deed 1748 carries Earl Thomas's purchases in which he was infert. I conceive it does, because the deed 1748 was a paramount settlement, governing the whole succession to all his lands; therefore the defences should be sustained generally.

Armada.—After considering the case with great attention, I remain of my former opinion. What is stated in the minute at first moved me; but now I think it can have no influence. Evidence sufficient appeared upon the service that David Kennedy was entitled to be served heir of provision.

President.—I agree there was sufficient evidence that David Kennedy was entitled to be served heir of provision; but is this enough? If it were, the eldest son serving heir in any character must be served in all characters. This never was before supposed. To illustrate the question, consider the analogous case of a general and special charge. There are three kinds of charges:—General charge, this only fixes representation; the special charge, as to subjects in which ancestor died infert; and the general special charge, as to the subjects in which the ancestor was not infert. General charge does not supply want of special charge, or general special charge. There are in like manner two kinds of general service:—Service in a general character, known in law as heir of line, or heir-male; or in a special character, as heir of provision. The character of heir-male is a general character known in law, and a person may be served in that character though there are no subjects to descend to the heir. But as to heirs of provision, whose specification depends entirely upon particular deeds, no man can be served heir of provision unless there be a deed by which he is called, and a subject which he is to succeed to in that character. The deed 1748 did not call David as heir-male, but as a substitute heir of provision specially called. He might have been served as such, but he never was served as such. The mere reading of the service in question is to me complete evidence that he never was served heir of provision. He was served heir of line, and heir-male,—nothing more. Any thing descendible to those he could take, but nothing more; and in these characters we may take large estates, but can take nothing descendible to heirs of deed 1748. Suppose only object of this service had been to reduce the deed of settlement 1748. It might have been so. Such a thing frequent, nay necessary to enable him to challenge. Upon this service as a title he might have brought a challenge of the very deed under which your Lordships suppose him to have served heir; so that the very act of making up a title to challenge would be a bar to the challenge, which is absurd. It was argued for the defender that Earl David not only had a title to be served heir of provision, but that he also possessed the lands; and this was alleged to be evidence that he intended to be served heir of provision. This, in the first place, is going out of the record; but next, it has

May 31. 1823.

‘ David’s general service tanquam legitimus et propinquior hæres
 ‘ masculus et lineæ of his only brother-german Earl Thomas,
 ‘ necessarily established him to be the heir under the settlement
 ‘ 1748, and vested in him the personal right of the subjects thereby
 ‘ conveyed to him ; and therefore that he has now right to the lands
 ‘ of Enoch and Little Enoch, the lands of Portmark and Polmea-
 ‘ dow, the tenements in Maybole, and teinds conveyed by Craw-
 ‘ ford of Ardmillan : repel the reasons of reduction as to these
 ‘ subjects ; assoilzie him from the conclusions of the summons as
 ‘ to them, as well as to those contained in the charter 1774, and
 ‘ decern.’*

no foundation, for Earl David was heir-apparent in every character. He was heir of the feudal investitures, or personal rights, by which the different properties belonged to Earl Thomas, and he was also heir-apparent of the deed 1748. So in every view he had a title to possess. Earl David never was served heir of the deed 1748, either expressly or by implication. To find that there was here a service by implication, must confound all our law of services, upon which the transmission of land estates from the dead to the living depends. The consequence must be dangerous. It is said, that one service was implied in another in the case of Haldane. I shall suppose that a right decision. But the service there was not a service as heir of line, but a service as legitimus propinquior hæres. This involved and imported that the party was both heir of line and heir-male. An eldest son could not be the one without being the other also. The decision only imports quod majus includit minus. Both are general legal characters ; and in the case of an eldest son, the one necessarily includes the other. It is a dangerous thing, however, to relax in the smallest degree any of the legal forms as to land rights ; and for that reason, though the decision may be right, I would have hesitated about pronouncing it, on account of consequences, and because it might be thought to loosen as it were one stone in the fabric of our land rights.

Craig.—Have hesitated, but, upon the whole, remain of former opinion,—for *pussus*.

Bannatyne.—The form of transmitting land rights highly important. Form should be fixed and certain ; and am of opinion that a service as heir of provision cannot be implied in service as heir-male and of line, which might subject him to consequences he never thought of.

Lord Justice-Clerk.—The service in question sufficiently points out Earl David to be heir of provision. It shews that Earl Thomas died without heirs of his body, and that Earl David had thus the substance. And I will not presume that it was intended to omit the form, but rather that he meant to be served, and the jury to serve him as heir of provision. It has been decided, that a service as heir of provision, without reference to any deed, will vest rights descending to heirs of provision under every deed. This attended with every inconvenience objected to the holding the service in question a service as heir of provision. Agree with Lord Meadowbank, that an heir-male is heir of provision. On the whole, think the service a sufficient service as heir of provision.

Cullen.—Service sufficient. There are two kinds of heirs,—heirs of line, and heirs of provision. Must think, that by serving as heir-male, meant to be served heir of provision.

President.—States difference between service as heir of line and heir-male, and service as heir of provision. No man can be served heir of provision without a deed of provision in his hand.

* The following Notes were taken by Thomas Walker Baird, Esq. :—

Lord Justice-Clerk.—If Earl David had applied to be served heir of provision, no

An appeal was then entered against these judgments by Mr Blane, on behalf of Sir Andrew; and on the 24th of May 1805

May 31. 1825.

man living could have objected. The service carried in is every description to shew that he was *de facto* the heir of provision. Heir-male is a character which must be assumed; not so that of heir of provision. This would go to the extent of obliging every one to serve heir of provision, wherever there was any destination whatever of the estate. Many instances where a service as heir of provision sustained where no mention of the deed alluded to. The verdict merely to ascertain the fact that the person has the right by the destination, and not necessary to specify it. Service as heir of provision is necessary when the person serving has no connexion with the estate but in that character.

Moodbank.—No new light in present papers; therefore unnecessary to enter into grounds of opinion at large. Objection to service not favourable. The verdict intended to declare the fact of the relationship of Earl David to his brother Thomas. This it does clearly and distinctly, and no more necessary, according to the principles of decided cases. Opinion of the late Lord Justice-Clerk shews the understanding of the country on this point. No such thing in our law as heir-male provisions legis; always provisions *hominis*; therefore a service as heir-male is necessarily a service as heir of provision. Any indication of will to accept succession, however slight, is sufficient.

Hermann.—Notwithstanding what he has heard, it appears to him the doctrine now stated is attended with incalculable danger. The general principle that rules his opinion is, that there can be no representation in any particular character, without an express declaration of will to that effect. Did Earl David shew any intention of connecting himself with the deed 1748? He did not. It is not for him to say what might be his reasons. Court must be prepared to declare they would pronounce the same judgment if the deed 1748 had been a strict entail, with irritant and resolutive clauses; or if the succession had been clearly *clausura*. Proof of identity does not make him heir served; it only shews that he was heir-apparent in that character. The decisions strongly support those principles: The late one of Colvin and Alison, in particular, was moved by the late Lord Justice-Clerk, and went upon no speciality, but upon this ground, that it was not a service as heir of provision.

Woodhouselee enters much into considerations of hardship arising from adherence to strict forms. Desirable, perhaps, that our law should relax. But although this may be our wish in speculation, sufficient to say that 'its *lex est*.' By the law of Scotland, a particular mode of service required, according to nature of subjects and titles. Even in case where heir *de facto* heir-male, of line, and provision, a service in the two former characters inept as to the latter.

Craig.—Uniformly of opinion of interlocutor, on grounds stated by the two last Judges. At same time, not surprised to find different opinions entertained upon it. A friend to strict law and forms, and the longer he lives the more so, especially as to land rights, which it is dangerous to relax, and the consequences impossible to foresee.

Armedale.—Would certainly be more correct, clear, and systematic, were it required that every heir in his claim of service should specify his particular character, the deed under which he claims, and the subjects he means to take up. But having in view the law and the decisions as they stand, he cannot concur in requiring these things. Must take the system as it stands, and make the best of it. The governing rule in all services is, that if it appears the claimant is the person who has the right, sufficient, although the character not specified. An heir-male always an heir of provision. True, an heir of a general character, but still he takes under a deed of destination. Decided, that one who served heir of provision was served also heir of line, although this last not expressed in service,—Kames.

May 31. 1825. the House of Lords pronounced this judgment:—‘It is ordered and adjudged, by the Lords Spiritual and Temporal in

Bennetynne.—Sir, Bankton, Erskine, concur in opinion, that the heir serving must indicate his intention to assume the character. Where the heir fails to enter, the creditors charge him to enter in the different characters of heir-male, heir of line, heir of provision, to his ancestor. As to decisions, that of Haldane perfectly consistent. Very clear, interlocutor should be adhered to.

Mathew.—Is at a loss for any sound principle of law on which the interlocutor should be adhered to. As the law has authorized the entry of an heir without specifying the deed he claims under, cannot see any necessity for repeating the expression, ‘heir of provision,’ nor does he see any additional clearness or distinctness would be provided by it. Inclined to alter the interlocutor.

President.—Case of Drumakiln must be remembered by all the Judges, where a considerable estate passed, contrary to clear will of proprietor, through the omission of a very small piece of form. Another topic in petition, that the use of a service is to prove fact of relationship. This, if true, would afford a very short answer to every plea of the respondent. But this is not the object of a service, and no such doctrine is taught in the law of Scotland. The object and use of a service is to carry heritable subjects out of the hereditas jacens of defunct, and to vest them in claimant. Never was the principle of the law of Scotland, that right of land, either real or personal, could be taken up by merely declaring a fact. The form of service is necessary, and equally necessary to attend to the character which the heir means to assume. Common sense, that a man may choose to represent ancestor in one character, without representing him in another. This appears clear as sunshine. As to general services, two kinds—one rather a general special service, applicable to case of a particular subject where no infestment. This analogous to general special charge. There is another kind of general service much more comprehensive, i. e. a general service as heir of line, meaning to vest merely the character without touching any subject. This entitles him to take up whatever subjects are descendible to heirs of line. But this does not comprehend a general service as heir-male, and will vest no such character in the claimant. Heir-male not a character given by deed, although he may succeed to subjects so provided; but it is a general character given by law,—as much given by law as the character of heir of line itself. Question here is, whether one claiming in a general character entitled to subjects provided to special heirs? Not sufficient the fact be proved that he had right to serve; and after searching through every one of the decisions, sees no authority for such a doctrine. In Haldane’s case a service tanquam propinquior et legitimus heres. The question came to be, what the meaning of this term? It is a mistake to suppose this always means heir of line; most frequently it does; but it may mean also heir of conquest in case of elder brother serving to younger. In same way, when a son serves to father, the service as heir of line necessarily implies heir-male. It was on these grounds the Court went in Haldane’s case and Earl Dalhousie’s. Can see no fault in giving it such construction. In present case there would have been more doubt if claimant had stopt at propinquior et legitimus heres. But he has defined the character masculus et lineæ. Doing the highest injustice to the memory of the honourable Judge who has been alluded to, in supposing his opinions would have been different from the interlocutor now before the Court, if he had had opportunity to consider the case as it has since been considered. Complains and laments that so much has been said of the opinion of that honourable Judge. Looks with some anxiety to the issue of this cause, for if the interlocutor altered, thinks he may bid farewell to service. This a point in which the country most deeply concerned, and hopes the Court will consider deliberately before altering the judgment.

‘Parliament assembled, that all the interlocutors complained of
 ‘in the said appeal, so far as the same relate to the lands and
 ‘subjects contained in the charter of 1774, or in any similar
 ‘titles, be, and the same are hereby affirmed. And it is further
 ‘ordered, that the cause be remitted back to the Court of Ses-
 ‘sion, to review all the interlocutors, as far as they respect the
 ‘effect of the service of Earl David in 1776, with regard to the
 ‘lands of Enoch and Little Enoch, the lands of Portmark and
 ‘Polmeadow, the tenements in Maybole, and teinds conveyed
 ‘by Crawford of Ardmillan, or any other lands or subjects, the
 ‘title to which is in dispute in this cause, if any such there
 ‘be, not ruled by the aforesaid affirmance; and to hear the par-
 ‘ties again as to the effect of the said service as to the said lands
 ‘and teinds, and as to the right to the said lands and subjects;
 ‘and to do thereupon as to the Court shall seem meet.’

When the case returned to the Court of Session, Sir Andrew and his trustee maintained, that the remit embraced other lands besides those specially mentioned; whereas Lord Cassillis contended, that the only proper question remitted for consideration was, What was the legal effect of Earl David’s service as to the above properties, and others depending upon a title similar to those specially mentioned? The Court, on the 10th of February 1807, pronounced this interlocutor:—‘Find, that Earl David’s
 ‘general service in 1776, was not a service as heir of provision,
 ‘to connect him with the settlement in 1748, or with any similar
 ‘deed of provision or settlement, and consequently was not suf-
 ‘ficient to carry the subjects which were specially provided by
 ‘any such deed, and were not contained in the charter 1774, or
 ‘any other title-deed or charter of a similar nature: Find,
 ‘that this description applies to the lands of Enoch, and Little
 ‘Enoch the lands of Portmark and Polmeadow, the tenements
 ‘in Maybole, and the teinds conveyed by Crawford of Ardmillan,
 ‘and that they were not carried by the general service; therefore
 ‘sustain the reasons of reduction as to these subjects, and so far
 ‘alter their interlocutor of 16th of November 1802; repel the
 ‘defences, and reduce, decern, and declare, in terms of the sum-
 ‘mons: But with regard to the lands of M^cGowanston, Mill of
 ‘Drumgirloch, Dunnymuck, Whitestone, Pennyglen, barony
 ‘of Greenan, and lands of Balvaird, find, that the order of the
 ‘House of Lords contains no special remit as to these lands, nor
 ‘has the pursuer sufficiently made out that they fall under the
 ‘general remit, or that, at any rate, the interlocutors formerly
 ‘pronounced as to these lands ought to be altered; and there-

May 31. 1825.

May 31. 1825. 'fore adhere to these interlocutors, and decern;' and to this judgment they adhered on the 24th of November. Against these judgments Sir Andrew and his trustee appealed, in so far as unfavourable to him; and the Earl also thereupon appealed in regard to the lands of Enoch, &c. (which he stated he would not have done had not an appeal been made by his opponent). To the competency of Sir Andrew's appeal, the Earl objected, that it had reference to lands, the title of which had, by the judgment of 1805, been found by the House to belong to him; whereas Sir Andrew contended, that they did not fall under the affirmance. The matter having been remitted to the Committee on appeals, they made the subjoined report.*

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- * By the Lords' Committees appointed to consider of the petition of ANDREW BLANE, Esq. appellant, in a cause depending in this House, to which the Right Honourable the Earl of CASSILLIS, and others, are respondents, praying that their Lordships will be pleased to take the premises into consideration, and to give such directions for the hearing of the questions which were at issue under the original appeal, and still undetermined, as to their Lordships, in their great wisdom, shall seem meet; and report to the House.

Ordered to Report,—

That the Committee have met, and considered the said petition, and have heard Counsel as well for the appellant as the respondents.

That the House having determined that it was not the intent of the House, in its judgment of the 24th of May 1806, to remit to the Court of Session to review their interlocutors, with regard to the lands of M'Gowanston, the Mill of Drumgirkish, Dunnymuck, the lands of Whitestone, Pennyglen, barony of Greenan, and lands of Balvaird, it has been represented to the Committee, that the title to these lands and subjects was in dispute in the appeal in which such judgment was pronounced: that the affirmance contained in the said judgment does not, according to the meaning of the terms of the judgment, rule the title to these lands and subjects, which, or some of which, are stated not to be lands and subjects contained in the charter of 1774, or in any similar titles: that the judgment thereof, if it contained no remit as to these lands and subjects, doth not contain the judicial opinion of the House upon the title to these lands and subjects, which was in dispute in the appeal; and that the House ought therefore now to proceed to judgment thereupon in some form, and previously to hear Counsel upon the title to these lands and subjects, it being alleged to your Committee, that upon the former hearing of appeal, during many days at the Bar of the House, the Counsel were not thereupon heard.

This supposed fact, your Committee represent as controverted on the part of the Earl of Cassillis, on whose behalf it has been insisted, not only that the title to these lands and subjects was before the House in the printed Cases of the appellant and respondent, but that it was spoken to by Counsel on his part, and on the part also of the appellant.

And your Committee find that it was represented, in the Case laid before your Lordships' House on behalf of the appellant, (the present petitioner), that in the Court below several questions had been agitated, which it had not been deemed necessary to enter minutely into in that printed Case, in as much as the points therein before stated at large, were considered by the appellant as ruling all the matters at issue in the cause; and that he should therefore only cursorily mention such other questions, reserving to

The House of Lords then pronounced this judgment on the 9th of May 1810:—‘ Find, that it was not the intention of this May 31. 1825.

himself to argue them at the Bar of the House, if that should appear to be expedient. He then represented these questions to relate to the following classes of lands:—

First, ‘ The lands of Portmark and Polmesadow, and others,’ specially mentioned in your Lordships’ remit, ‘ which it was observed were purchases made by Earl Thomas, upon which he died infeft upon base holdings, the dispositions whereof had been granted to him, his heirs and assignees; but these dispositions, as acquirenda, were ruled by the destination of the entail of 1748; and as to them there existed no other personal right, which could be taken up by Earl David’s service in 1796.’

Secondly, ‘ The lands of Bardarroch, Daljarbrie, and the Citadel of Ayr: That these were not in the charter of 1774, but remained upon the titles which Earl Thomas had acquired therein as a purchaser; that so far they were in the same situation with the lands in the first class: That so far they differed from them, that Earl David made up a title as heir of line, conform to the destination in the title-deeds of these lands; but that, as he made up no title under the ruling deed of 1748, his making up a title as heir of line was unessential.’

Thirdly, ‘ The lands of M’Gowanston, Mill of Drumgirloch, and Dunnyneuck, in the property of which Earl Thomas was infeft in 1748, and the lands of Whitesma, in which he was infeft in 1767: That these were included in the charter 1774, and of course fall under the general argument as to all the lands contained in that charter; but they were also affected by other questions, upon which it was contended in the Court below, that from a defect in consolidating the property with the superiority of these lands, the titles thereto made up by Earl David were from that cause also altogether ineffectual and insufficient.’

Fourthly, ‘ The barony of Greenan and lands of Balvaird: That these formed a very considerable portion of the estate, and were not included in the charter 1774; but that they had been in 1765 parcelled out into freehold qualifications for purposes precisely similar to those which regarded the lands in the charter 1774: That Earl David, too, made up his title to the barony of Greenan and lands of Balvaird, upon the footing of the titles taken for these temporary purposes; and also as to them neglected the ruling destination in the entail of 1748: That as to them therefore, also, the general reasoning relative to the lands contained in the charter 1774 fully applied.’

The Committee, citing this statement from the printed Case of the petitioner in 1805, (then the appellant), take leave to observe, that with respect to the first of these four classes of lands, they are the subjects of express remit to the Court of Session, and not the objects of the petition.

That with regard to the second class, they are stated to differ as to title from the first, but not essentially, and that they are not understood to be the objects of the petition.

That as to the third class, they are expressly stated in the printed Case of the petitioner, 1805, (then the appellant), to be included in the charter in 1774; and the affirmation by the judgment of the House of all the interlocutors relating to the lands and subjects contained in the charter of 1774, is not qualified by any remit as to any supposed defect in consolidating the property with the superiority of these lands. (These lands are the objects of the petition.)

That as to the barony of Greenan and Balvaird, (the barony of Greenan having been particularly pointed out by the Counsel attending the Committee, as not being in a title similar to the lands contained in the charter of 1774), the House will observe, that the petitioner, the then appellant, reserved to himself to argue the title if it should be expedient; and will also observe, how far the appellant admits the reasoning relative to

May 31. 1825. ' House, in its order of 24th May 1805, either specially or generally, to remit to the Court of Session to review their inter-

the lands contained in the charter, to apply to these subjects, though not contained in it. These subjects are also objects of the present petition.

The Committee further report, that, whether the question of the title to these lands and subjects was, or was not, argued at the Bar of the House in the year 1805, the state of the title to them appears to have been before the House, with an opportunity for the then appellant, reserved by the appellant himself, fully to argue the titles to them, if it appeared expedient to argue them. They further represent, that it seems obvious that it could not possibly be the intent of the House, under the general words of the judgment, to remit to the consideration of the Court of Session the titles to the 3d and 4th classes of lands and subjects; those contained in the 3d being by the appellant stated, in his Case in 1805, to have been contained in the charter of 1774; and those contained in the 4th class, though not comprehended in the charter of 1774, being stated by the appellant in that Case of 1805, to be lands to which the general reasoning relative to the subjects comprehended in that charter fully applied. And when it is further observed, that the appellant stated those of the 4th class, ' to form a very considerable portion of ' the estate,' it is conceived that the House, making express mention in its remit of Enoch, and the other small parts of the estate called the pendicles, could not possibly mean by its general words to remit questions with reference to the considerable parts of the estate mentioned in the 3d and 4th classes, without specifically naming any one of the lands and subjects therein contained: that the House could not possibly intend, with its attention thus far called to these lands and subjects, as a considerable part of the estates, with circumstances in the titles differing them from the titles to Enoch and the pendicles, to remit to the Court of Session the questions relative to such parts of the estates, under the words in the judgment following the express enumeration of the pendicles:—viz. ' any other lands or subjects, the titles to which is in dispute in this cause, ' if any such there be not ruled by the aforesaid affirmance.'

The Committee further conceive, that it must have been the intention of the House itself, to decide upon or to direct a review of all parts of all the interlocutors which were to be considered and understood as complained of, at the time the House pronounced its judgment: That it could not intend, if its judgment was called for upon all the subjects in dispute, to remit a part of those subjects to the review of the Court of Session, to decide upon a part of them, and with respect to another part of them neither to pronounce a decision or make any remit.

And the Committee report it as their opinion, that it was the intention of the House, in its judgment, to affirm the interlocutors of the Court of Session, with respect to the lands and subjects mentioned in the petition referred to their consideration. The interlocutors, so far as they relate to the lands and subjects contained in the charter of 1774, or in any similar titles, are affirmed: And your Committee observe, that the remit to the Court is, to review the interlocutors, as to the effect of the service of Earl David in 1776.

Most of the lands mentioned in this petition are stated by the appellant's Case in 1805 to be contained in the charter of 1774; and although the words ' similar title' may not be accurately applied to Greenan and Balvaird, and those subjects are not contained in the charter 1774, yet, as it has been above stated, the general reasoning to the lands in the charter 1774 was represented in the appellant's Case itself as fully applying to them; and the titles as to these, your Committee understand to have been made up by Earl David, by precept of clare constat for infetting himself. The Court of Session, though they were of opinion that the remit of the House did not authorize them to review their

‘locutors with regard to the lands of M^cGowanston, Mill of Drumgirloch, Dunnymuck, Whitestone, Pennyglen, barony of Greenan, and lands of Balvaird; and that the Court of Session were not authorized to review their interlocutors with relation thereto by the said order of this House; and that such parts, therefore, of the said interlocutors of the Court of Session, of 10th February and 24th November 1807, as have relation thereto, being unauthorized by the remit of this House, are null and void, (being the parts of the interlocutor which are unfavourable to the appellant, Blane, and as such complained of in his appeal); and with this finding and declaration, it is ordered and adjudged, that the appeal be dismissed.’

May 31. 1825.

Thereafter, in 1825, (the interlocutors in the action of exhibition not having been extracted), Sir Andrew, availing himself of the standing order of the House of Lords, appealed against them.

Appellant.—The appellant is entitled to the benefit of the process ad deliberandum in the character in which he sues. As heir, he has right to see the deeds which belonged to his ancestors; and it is no answer to say that one has been executed by which his title to the estate is cut off. This is a mere petitio principii, because the question is, whether his right is cut off? and by law he is entitled to see all the deeds in order to be satisfied on that point.

interlocutors as to the subjects of the present petition, did review them, and upon the merits adhered to their former judgment against the petitioner.

But your Committee are further of opinion, upon looking through the papers in the cause which were before your Lordships, that it would be of very dangerous example to permit these questions to be discussed now at your Lordships' Bar; and that, if the judgment of the House is to be represented by the petitioner as not intended to affirm in its terms the interlocutors with respect to those lands and subjects, and to have been pronounced without any manner of discussion having taken place upon the questions relative to them, the appeal, under all the circumstances of this case, ought to be considered as having been passed from, or waived as to these questions, and that the interlocutors therefore of the Court of Session ought to be considered as final. Upon the whole circumstances, therefore, the Committee submit to the House, that it may be expedient to resolve, that the petitioner ought not now to be heard upon the questions relative to these lands and subjects, and that the interlocutors of the Court of Session relative to them ought either to be understood as already affirmed in the judgment of this House, or that, under such circumstances, if, in a strict construction of the terms of the judgment, they are not so affirmed, the House ought to explain the judgment, and affirm them, or declare that the interlocutors of the Court of Session with respect thereto ought now to be considered as final.

Which report being read by the Clerk, was agreed to by the House, and the petition ordered to be rejected.

May 31. 1825.

Respondents.—It is settled law, that a disposition or entail, excluding the heir of law, and conferring the right to the estate on a stranger, deprives the heir of his right to an action of exhibition, unless he shall succeed, in the first place, in setting the deed aside. But the entail of Earl David has been recognized and acted on for more than thirty years, and it is not competent, under an action of exhibition ad deliberandum, to allow the heir to ransack the charter-chest in order to find out grounds for reducing the deed which excludes him.

The House of Lords ‘ordered and adjudged, that the appeal ‘be dismissed, and the interlocutors complained of affirmed, ‘with L. 200 costs.’

Appellant's Authorities.—3. Stair, 5. 1.; 4. Stair, 33. 4.; 3. Bankton, 5. 7.; 3. Ersk. 8. 56.

Respondents' Authority.—4. Ersk. 8. 56. and cases there.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

No. 31.

Honourable WILLIAM MAULE of Panmure, Appellant.
Warren—Brougham—Moncreiff—Murray.

FOX MAULE, Esq. Respondent.—*Cranstoun—Jeffrey—Cockburn.*

Aliment.—The Court of Session having found, that a son who had a commission in the army as an ensign, with L. 90 of pay, and an allowance of L. 100 a-year from his father, (who was an heir of entail in possession of an estate yielding an income of L. 10,000), was entitled to an aliment of L. 800 per annum from his father; the House of Lords reversed the judgment, and assolized the father.

June 1. 1825.

1st DIVISION.

IN 1822, the respondent, Fox Maule, Esq. (who was then about twenty-two years of age), raised an action of aliment before the Court of Session against his father, the appellant, the heir of entail in possession of the estate of Panmure. In the summons, after founding on the deed of entail, he set forth, ‘that the pursuer ‘is apparent heir of entail under the said deed to his said father, ‘and has been educated in a manner suitable to his rank and ‘prospects, and is entitled, besides, as the lawful son and presumptive heir of his father, to a suitable aliment and maintenance out of the ample estates that belong to him; but the only ‘provision which the pursuer’s father has made for his support ‘has been to settle upon him L. 100 a-year, and to obtain for ‘him an ensign’s commission in our 79th regiment of foot, which

June 1. 1885.

‘ the pursuer at present holds: That the said defender, ever since
 ‘ the month of May 1819, harbouring a groundless dislike
 ‘ against the said pursuer, refused to provide for the aliment of
 ‘ the pursuer in a manner suitable to his early education, present
 ‘ rank, and future prospects, as apparent heir of entail of the
 ‘ said lands of Panmure. And although the pursuer has often
 ‘ and divers times desired and required the said William Maule,
 ‘ defender, to grant him such reasonable aliment, proportioned
 ‘ to the said rents and produce of the said lands and estate, as to
 ‘ enable him to support his rank suitable to his education and
 ‘ quality in life, and for the maintenance of the said pursuer,
 ‘ nevertheless the said defender refuses, at least delays, so to do :
 ‘ And seeing, that by the law of nature, as well as the laws of
 ‘ Scotland, the said Fox Maule, pursuer, as representing the
 ‘ said noble family of Panmure, and as next in succession to the
 ‘ said lands and estate of Panmure after the said defender, is
 ‘ entitled in the mean time to be alimented out of the proceeds
 ‘ and profits of the said lands and estate in a manner suitable to
 ‘ his rank and station; therefore it ought and should be found
 ‘ and declared, by decret of our said Lords of Council and Ses-
 ‘ sion, that the said pursuer is entitled to a suitable aliment from
 ‘ his said father ex debito naturali, and that the said Fox Maule,
 ‘ pursuer, is in the mean time entitled to a maintenance for him-
 ‘ self, and to an aliment suitable to his elevated rank and station,
 ‘ out of the rents, produce, and profits of the said estate, where-
 ‘ unto he is entitled to succeed after the said defender, in terms
 ‘ of the said rights and investitures of the same. And it being
 ‘ so found and declared, the said William Maule ought and
 ‘ should be decerned and ordained, by decret of our said Lords
 ‘ of Council and Session, to make payment to the said Fox
 ‘ Maule, pursuer, of the sum of L.2000 yearly, as a reasonable
 ‘ and suitable allowance, according to the rank and station, for
 ‘ the support of the rank of the said family to which he is entit-
 ‘ led to succeed, or such other sum as our said Lords may think
 ‘ fit and reasonable in the circumstances of the case, and that at
 ‘ four terms in the year, Candlemas, Whitsunday, Lammas, and
 ‘ Martinmas, by equal portions, beginning the first term’s pay-
 ‘ ment thereof at the term of Martinmas last, and quarterly
 ‘ thereafter, during all the years and days of the lifetime of
 ‘ the said defender.’

In defence to this action, the appellant stated: ‘ The defen-
 ‘ der is possessed of the fee, and his son, the pursuer, is next
 ‘ in the succession of the entailed estate of Panmure; but by the

June 1. 1825. 'provisions of that entail, events, over which neither of them
 'have any controul, may entirely deprive the pursuer of any
 'chance of the succession to that estate. The defender has
 'always acknowledged and performed his duty as a father, in
 'educating and alimenter the pursuer. He gave him an excel-
 'lent education, and purchased a commission for him in the
 'army. In other respects, the defender has made such allow-
 'ances to his son as he concluded (by the advice of the colonel
 'of the regiment, and other eminent officers) to be proper and
 'adequate to his situation in his profession. But while the
 'defender is ready to perform his duty to his son, he denies the
 'competency of the present action, and maintains, that the pur-
 'suer has no right, as an heir of entail, or in any other character,
 'to apply to this Court, and desire them to interpose between a
 'son and a father, and assume the discretion of measuring out
 'and apportioning the aliment which he shall give him. It is
 'the defender's duty to alter, vary, or increase, according to
 'existing circumstances, that aliment, he, as a father, may think
 'most advisable in the particular case; and while he is willing
 'to perform it, he submits that a Court of law is not called upon
 'or entitled to exercise any jurisdiction in the matter.' The
 appellant farther denied the allegations of the respondent, that
 he harboured a groundless dislike against him, or that the res-
 pondent represented the family of Panmure, or that he was in a
 state of that destitution which was essential to found an action
 of aliment. He farther averred, and offered to prove, '1. That
 'he was proprietor of large landed estates held by strict en-
 'tail, but affected by very heavy burdens, reducing his actual
 'income to about L.10,000 a-year, with a capital of debt of
 'nearly L.30,000, besides a variety of contingent claims of a
 'serious nature. 2. That the respondent is the next heir of
 'entail; but that, while in this respect his rights are not diffe-
 'rent from the rights of any other heir of entail, his chance of suc-
 'cession may be entirely defeated, even though he should survive
 'the appellant, in consequence of a provision in the entail, by
 'which, in the event of the honours and estates of Dalhousie;
 'now vested in the appellant's elder brother, devolving on the
 'appellant, the estates of Panmure shall devolve to other heirs;
 'to the exclusion of the appellant's eldest son. 3. That the res-
 'pondent was fully educated in a manner suitable to his rank
 'and station. 4. That the respondent, by his own choice,
 'entered into the army, and that the appellant purchased for
 'him a commission, which he still holds. 5. That the appel-

June 1. 1825.

‘lant made an allowance to the respondent, in addition to his
‘pay, of L.100 per annum. 6. That this allowance was more
‘than the sum which the colonel of the regiment to which the
‘respondent belongs, as well as other persons qualified to give an
‘opinion, advised the appellant to be proper and adequate to the
‘situation. 7. That persons of great eminence in the British army,
‘and in particular the late Sir John Moore, had acted upon a rule,
‘by which the ensigns in such a regiment were prevented from
‘having a larger allowance than L.100 a-year in addition to their
‘pay.’ And he further stated, that although the Court had no right
to take cognizance of the matter, he was ready, when a proper
opportunity occurred, of purchasing the respondent’s promotion
in the army. No proof was taken as to the respective allegations
of the parties; and the Court, after a hearing in presence, and
advising memorials, ‘repelled the defences for the Honourable
‘Mr Maule, and found him liable in a suitable aliment to the
‘pursuer; but before further procedure appointed the defender
‘to give in a condescendence of his free income.’ A condescen-
dence was accordingly lodged, from which it appeared that his
income was L.10,515. 10s. 1d., but that he was burdened with a
capital debt of L.30,000, and was fifty-two years of age. No
answers were lodged by the respondent, (he being willing to hold
the statements in the condescendence as true), and thereupon
the Court, on the 9th of July 1823, ‘modified the sum of
‘L.800 sterling yearly for aliment to the said Fox Maule, the
‘pursuer, and decerned the defender to make payment thereof
‘at two terms in the year, Whitsunday and Martinmas, by equal
‘portions, commencing at Whitsunday last for the half-year im-
‘mediately preceding, and the next term’s payment at Martin-
‘mas next, and so forth half-yearly, during the joint lives of the
‘pursuer and defender, or until the said aliment shall be altered
‘or recalled by this Court;’ and found him liable in expenses.*

The Honourable Mr Maule appealed.

Appellant.—The plea maintained on the part of the respon-
dent, and which has been sanctioned by the Court of Session, is,
that by the law of nature, and by the law of Scotland, founded
on it, a father is bound to maintain his children; that this obli-
gation is perpetual, and subsists even after a child, whether male

* 2. Shaw and Dunlop, No. 452.; and see Opinions of Judges, Fac. Coll.

June 1. 1885.

or female, is of full age, as long as in point of fact the child has not the means of maintaining itself; that by the law of Scotland, according to various authorities and decisions cited, this obligation of aliment varies according to the rank and station of the parties, and that in all cases the child must be alimented in a manner suitable to the rank, station, and fortune of the father; that therefore in each particular case it belongs to the Court of Session, and is competent for them to determine, whether the child is or is not alimented in a manner suitable to the rank, station, and fortune of the father; that the case of the father refusing to aliment the child at all, and the case of his giving an aliment with which the child is dissatisfied, and which the Court of Session shall think not to be suitable to the rank and fortune of the father, are the same in point of law: And therefore, according to these principles, although the respondent is an officer in the King's army, drawing pay, with the additional allowance made by the appellant of L.100 a-year, this must be considered as unsuitable to his rank and station, and as placing the respondent entirely in the same situation as if he were totally destitute, and the appellant had refused to give him any aliment at all; so that the action for aliment was competent and well-founded, and the Court were entitled to order the appellant to give in a condescendence of his whole means and estate, disclosing the state of his private affairs; and that they were thereafter called upon and entitled to give to the respondent, by the force of a decree of the Court, a right to such a proportion of the appellant's yearly estate or income as they might think suitable to the rank, station, and fortune of the appellant. Such a plea, however, is not only groundless in itself, but of the most alarming nature, as it tends to establish a principle which would unhinge the most important relations of civil life. The appellant has no occasion to enter into any question in the present case as to his obligation both to educate and to maintain the respondent in the rank and condition of a gentleman;—he had always done so—he had given him, as admitted in the summons, a most liberal education, becoming his rank and station, and had subsequently, with the respondent's own full concurrence, placed him in the profession which was perhaps of all others the most suitable to his rank, condition, and prospects. A person who has adopted a profession is only entitled to be maintained in a manner suitable to that profession; and it is absurd to maintain, that a person who was in fact enabled to live as a gentleman, in the pursuit of an honour-

June 1. 1825.

able profession, and in the society of other gentlemen, is not maintained or alimented, or is in any sense of the term in a state of indigence or destitution. A father has by law the uncontrolled administration of his own estate, and a discretion in the allowances which he chooses to make to his own children, whether in minority or of full age; and therefore it is altogether incompetent for a Court of law or equity to interfere with him in the administration of his own property, or in the management of his own family. The appellant therefore was not accountable to any Court for the reasons which influenced his judgment in the allowances made to his children; and there were not wanting the most substantial grounds on which that judgment, in the case of the respondent, might be defended as positively right. But, besides, the case of the proprietor of an entailed estate was for many reasons the strongest of all against the interference of the Court. As an heir of entail, the respondent has already a *jus crediti*, which gives him a reversionary estate, his right to which could not be defeated by his father, and which some of the Judges held to be more valuable in the market than the appellant's own estate. At any rate, the proprietor of an entailed estate, with a large family like the appellant, had more urgent reasons than any other person for exercising caution and prudence in the allowances made to his eldest son; and on the other hand, where the son was already to so great a degree independent of the father's will, there were the most serious considerations to prevent the interference of Courts of law with the exercise of that discretion which still legally remained with the father. But the plea now maintained by the respondent, if well founded, depends on a principle which will entitle the next heir of entail in all cases to call upon the Court to require an account of the rents and burdens of the estate, and then to give decree for a large proportion of those rents to be paid to the substitute heir of entail; in other words, a principle which renders it competent for the Court, on arbitrary notions of what is suitable and reasonable between father and son, to take what is confessedly the property of one man and give it to another. Even, however, were it to be assumed that a father is bound to maintain his son in a manner suitable to his rank and condition, and farther, that if he does not do so, and the son has not other means of so supporting himself, an action for aliment is competent, and the Court has power to determine what is a suitable aliment; in this view, the appellant denies that this resolves the question of law and competency which arises in the

June 1. 1825. present case. The question remains, what is legally meant by a man having the means of living according to his rank and condition in the world? The respondent's position adopted by the Court is, that he must have a sum allowed to him bearing in all cases a certain proportion to the extent of the father's estate or property, to be fixed by the opinion of the Court. If he has not such an allowance, or rather if he chooses to say that he has not, he is entitled to come to the Court by an action of aliment, and the Court, upon his averment, is entitled, and imperatively bound, to compel the father to make a complete disclosure of his whole private affairs, the title by which he holds his estates, the rents which they yield, the burdens by which they are affected, all the private debts, transactions, bonds of annuity, &c. in which he may be engaged, under the penalty of being held as confessed on any statement, however exaggerated, which the son may make; and that then the Court are entitled to judge, by no rule but their own discretion, whether the son already has a suitable aliment, and if they think not, what shall be held suitable for each of ten thousand varieties of cases which may be so presented to them. If the doctrine were sound, it would be more properly a jury question, or a question of accounting in every case. But the whole theory proceeds on a violent abuse of words, and a refusal to look at the plain distinctions which lie on the surface of the common sense of the question. When it is said, or even laid down by lawyers, that a person entitled to aliment must be alimented suitably to his rank and condition, the statement has no reference to any precise standard of money, or to any proportion connected with the debtor's income. It means, that the son of a tradesman must be alimented like the son of a tradesman, and that the son of a gentleman must, in a general sense merely, be alimented in the condition of a gentleman. It refers to the general description of the various status which exist in society, and imports only that the broad lines which palpably separate them are not to be transgressed. But in all such general descriptions, there are comprehended very various degrees and ways in which the status may be maintained. The condition of a gentleman may be maintained in ways and degrees infinitely diversified. And therefore, when a question arises upon a claim of aliment by a person in the condition of a gentleman, (granting the general position that that condition is to be taken into view), the appellant denies that the meaning of the doctrine is, that you are in every case to estimate the degree and manner in which he is so supported, by a reference to that which a Court of law may

June 1. 1825.

be pleased to think the estate of the father might possibly, or even fairly afford. The question on the hypothesis is, whether the son is alimented in the condition of a gentleman, or in that condition is destitute of aliment. The question is not, whether he has a liberal allowance from his father; not whether he has what others of the same apparent fortune might give to their sons; not whether he is in every view made independent of the good will of his father; not whether he has what the Court, or any of them, may think they would give in similar circumstances. The very term 'aliment,' and the nature of the action as an action of aliment, have a plain meaning, which excludes all such questions. If the party is alimented as a gentleman, the rule of law (granting it in the terms assumed) is satisfied, whether that aliment bears a proportion to an estate of L. 20,000 a-year, or to an estate of L. 5000 a-year, or to an estate of L. 1000 a-year. Every thing beyond the aliment necessary for a gentleman is, by the laws of nature, the rights of property, and the order of society, left in the discretion of the party on whom the obligation lies. But that which cannot be denied to be the aliment of a gentleman in one case, must necessarily bear the same character in every case; and where it exists, must exclude altogether that case of necessity which alone can justify the interference of a Court of law.

It is a mistake to suppose, that because the civilians lay it down that a father is bound to aliment his children *pro modo facultatum*, they mean, that he is therefore to proportion the aliment to the extent of his funds, however large they may be. The *dictum* has reference to the situation of a person whose funds are small, and means that he can only be obliged to aliment his children according to his ability. But it is impossible for the respondent to allege that he is in a state of destitution. He has confessedly not only that which the State regards as sufficient for his support, but also L. 100 a-year; whereas, according to the doctrine of the Court of Session, he must be considered as destitute unless he has L. 800 a-year, being more than twice the amount of the pay of the commander of the regiment in which he is a subaltern.

The statute 1491, c. 25. has no application to the present case, for the appellant is not a liferenter, but, so far as not fettered by the entail, is a fiar.

Respondent.—Although the respondent's claim rests both upon the statute and the law of nature, yet he admits that it is chiefly upon the latter that it is rested. The claim which a child has

June 1. 1895.

against a parent, arises entirely from the duty under which parents are laid by nature of maintaining their offspring, and from the interest which society has in enforcing the fulfilment of that duty. This does not depend upon any presumed contract or agreement of parties, but is one of the provisions of nature which are antecedent to all private compacts and to all written laws. Its existence is distinctly laid down, and its general principles explained, in various parts of the Roman code. The respondent need not quote these, but he may refer in general to the title in the Pandects, 'De agnoscendis et alendis liberis.' The rules which were acknowledged in the civil law, have been incorporated for ages into that of Scotland. Accordingly, the following may be safely laid down as elementary and indisputable rules:—1st, That, in its origin, the claim is coeval with the paternity of the child, and forms one of those *jura sanguinis* which no private agreement can defeat: It is indissoluble. According to Bankton, B. 6. tit. 45. § 17. 'No compact between parents and children, that 'they shall not maintain each other, when the one is reduced to 'extremity, and the other in condition to support him, can be 'effectual in law.' 2dly, That in its amount it does not merely comprehend the means of subsistence. It reaches beyond what is strictly necessary for the bare support of animal existence, and is measured, not merely by a consideration of the wants of the one party, but by a still stronger consideration of the duties of the other. It therefore includes not only the means of education, but general maintenance suitable to the claimant's rank and situation in life. And, 3dly, That there is no particular period at which the duration of this natural and indissoluble claim terminates. It has been supposed, that where it is preferred derivatively against collateral relations, it stops on reaching majority; but no such limitation has ever been affixed to it when it has been made directly against a parent. 'The obligation,' says Erskine, (B. 1. tit. 6. § 56.) 'which lies on parents to maintain 'their indigent children is perpetual.' Indigence is the criterion of the claim, and this is only strengthened by the addition of age. Numerous decisions have been pronounced, and the great basis on which they all rest, and the great result which they all imply, is, that the demand is always to be judged of with reference to practical life, and to the real situation of the parties; that the *jus naturæ* is no more to be converted into a pretence by which the child may encroach upon the independence of the parent, than the *patria potestas* is to be made an instrument by which the parent may degrade the child; but that wherever there is

June 1. 1825.

such helplessness as amounts, in the common sense of mankind, to a disqualification from following the pursuits, or maintaining the station which becomes the condition of the family, the claim for aliment, being one of those moral duties which the father is under a natural obligation to fulfil, is to be liberally considered. Accordingly, the great dispute in almost every one of the adjudged cases has been, whether or not aliment was exigible, and not what should be its amount. Because it seems always to have been felt, that when it was once settled that the claim was well founded, the adjustment of the sum was a very simple matter. Whether it should be a greater or less proportion of the father's funds, may have given rise to some doubt in particular cases; but the whole title of 'Aliment' in the Dictionary attests, that it has uniformly been felt that it must bear such a reasonable proportion as no parent, who was really anxious to fulfil his natural obligation, would ever think of falling below.

The appellant, however, attempts to make the determination of the claim depend upon a principle which was never hitherto brought into operation in any question of this description. Although he admits, 1st, That the father is bound to maintain the son; 2dly, That this obligation does not cease upon the son's reaching majority; 3dly, That it is not superseded by the son's having a trade or possession which does not yield him an adequate support; 4thly, That therefore, though the respondent be twenty-two years of age, and has an ensign's commission in the army, he is entitled to have aliment from his father;—yet he contends, that in fixing the amount to be given, the father is omnipotent. But although there is no doubt that a father has a right to exercise his discretion in the first place, it must be fairly exercised, and not abused; and consequently, where it is alleged that it is abused, the Court is entitled to interfere and do justice. Now, the basis of the respondent's complaint is, that although he had confessedly a legal right of aliment, yet, speaking practically, the discretion of his father in fixing its amount, with reference to the situation in which he is placed, the various duties which his station in society imposes upon him, towards his own family, to himself, to the public, and the profession in which he is engaged, has not been exercised, but has been evaded. The Court, therefore, was entitled to award an adequate aliment to the respondent.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be reversed, and that the defender be 'assoilized.'

June 1. 1825. LORD CHANCELLOR.—My Lords, Your Lordships were pleased to appoint the case of Maule v. Maule for the judgment of your Lordships this morning; and recollecting the hour of the day to which we have now got, and considering that there are Counsel attending in other cases, I shall go no farther than to state the circumstances of this case, in order that the House may be in possession of the case standing for judgment; and the state of the cases in progress to judgment appears to make it necessary to make some arrangement with the noble and learned Lord who is not now present, by which the House may be enabled to proceed to some judgment at ten o'clock in the morning on some particular days, instead of beginning those judgments at this period, in consequence of Committees of Privilege sitting on Mondays and Thursdays; that we should be enabled to commence at an earlier period of the day, and to apply the day to the purposes of judgment, instead of calling on parties to attend by their Counsel, when it would be quite impossible to hear them. I will endeavour to make some such arrangement as may be necessary for that purpose.

My Lords,—This cause of Maule v. Maule is perhaps one of the most important, at least it appears to me to be so, that the House has ever been called upon to consider; and I very well recollect, when it was in the course of hearing, it had frequently occurred to your Lordships, who had heard something of the cause, that if the law as pronounced in this judgment was the law of Scotland, it ought not to be the law of Scotland any longer;—but if that proposition can be maintained, your Lordships, I am sure, will bear in recollection, that the alteration of the law cannot be made in judgment in any case now depending, but must be made by an Act of Legislation. The question, therefore, you have to determine in this case is, whether the law of Scotland has been properly declared, attending to the particular circumstances of this case. If it has, you must be bound in judgment; if your Lordships are satisfied that it has not, of course the judgment must be reversed.

My Lords,—The facts of the case, as I understand them, may be represented to your Lordships in the following manner:—This was a summons, which they call a summons for aliment, in respect to which considerations arise out of the Act 1491, and out of the question, what is the law with respect to aliment *jure naturæ*? This was a summons brought by Mr Maule, who represents himself to be the ‘eldest lawful son of the Honourable William Maule of Panmure, and heir of entail next in succession to the lands and estate of Panmure after the said Honourable William Maule:’ Then it represents, ‘that the now deceased Right Honourable William Earl of Panmure, for the better preservation of his family and memory, and continuation of his estates with his relations and heirs of taillie therein mentioned, executed a deed of entail, which is dated the 12th of October 1781, registered in January 1782 in the Register of Entails, and in the Books of Council and Session the 8th of February of the same year, of his lands and

‘estate of Pannure, and others particularly described, with and under June 1. 1825.
 ‘the conditions, restrictions, limitations, prohibitions, clauses irritant
 ‘and resolute, declarations and reservations therein mentioned.’ And
 by this instrument ‘he gave, granted, and disposed to himself, and the
 ‘heirs of his body, whom failing, to the now deceased George Earl of
 ‘Dalhousie, his nephew, in liferent,’—making George William Dalhousie
 the liferenter;—and to the ‘said William Maule, therein designed
 ‘William Ramsay, his second son,’—not as the liferenter, but to him as
 second son in fee, ‘and the heirs-male of the body of the said William
 ‘Maule; whom failing, to the other heirs therein mentioned, with and
 ‘under the condition, that in case the succession of his said lands and
 ‘estate should, in consequence of the foresaid destination of succe-
 ‘sion, devolve upon the said George Earl of Dalhousie in liferent, and
 ‘the said William Maule his second son, or any of the heirs substituted
 ‘to him, in fee, as the said George Earl of Dalhousie would during his
 ‘life have the total liferent of his said estate, so on that account he,
 ‘by acceptance of the liferent, was bound and obliged to aliment, main-
 ‘tain, and educate the said William Maule, and failing him the other
 ‘heirs substituted to him in the order set down, in manner suitable to
 ‘their rank and station, until the said William Maule or the other
 ‘heirs should arrive at the age of fourteen years complete, when he,
 ‘the said William Maule, was to have L. 500 sterling a-year; and after
 ‘the said William Maule, or any of the heirs succeeding to him, ar-
 ‘riving at the age of twenty-one years complete, he, the said William
 ‘Maule, was to have an additional annuity of L. 500 sterling yearly,
 ‘making in the whole an annuity of L. 1000 sterling. That in case the
 ‘said William Maule, and failing him, the heirs therein mentioned, ac-
 ‘cording as they should succeed in virtue thereof, should either be mar-
 ‘ried or in Parliament, in either of those events a farther additional an-
 ‘nuity of L. 1000 sterling, making in the whole the sum of L. 2000 ster-
 ‘ling:’ from which conditions it appears, that the entailer had an anxious
 desire that the heir-apparent should be amply provided for—the estate
 at that time not exceeding L. 10,000 a-year, while it is now L. 25,000.
 Your Lordships will see what the value of the estate therefore is,
 when I come to state some of the disclosures that have been called
 for by the Court of Session.

My Lords,—I have pointed out, in the manner in which I have ex-
 pressed myself, the fact, that George Earl of Dalhousie was a liferent-
 er, and that William Maule had the estate to him and the heirs-male
 of the body of the said William Maule; because it may possibly, when
 you come to see what persons had the estates in the year 1791, be
 considered as applying in construction,—it may be material that the
 Earl of Dalhousie was the liferenter, and that William Maule by the
 disposition took to him, and to the heirs-male of his body. With respect
 to the particular part I have read, as to the aliment the Earl of Dal-
 housie was to make to the next heir, whether William Maule or any
 one taken by substitution after him, it may be material to state the

June 1. 1825. order. This settlement is made on the Earl of Dalhousie in liferent, paying William Maule or the heirs substituted calling for it, an allowance of L. 500 a-year, from the age of fourteen to twenty-one; and after twenty-one an annuity of L. 1000 sterling; and in case of being married or sitting in Parliament, an additional annuity of L. 1000 sterling; making in the whole a sum of L. 2000 sterling yearly. I find that, with respect to those to take after William Maule, the other heirs substituted, there are in the entail various directions, which it is not necessary to detail; but this clause inserted in the summons takes no notice of what is to be or what is not to be allowed by way of annuity to the person to take after the person in possession, with reference to the clause in the same deed of entail, by which persons divest themselves in certain cases of the possession of this estate.

The next allegation is, 'That in virtue of this deed of entail, the said George Earl of Dalhousie succeeded to the liferent of the said lands and estate of Panmure, which he enjoyed till the year of his death in 1787, when the Honourable William Maule, the pursuer's father, and institute under the deed, succeeded to the lands and estate of Panmure, which he has enjoyed ever since.' It then charges, 'that the appellant is apparent heir of entail, under the deed to his father, and has been educated in a manner suitable to his rank and prospects.' And I take leave to repeat those words, because I think, in the consideration of this very important case, it will be necessary to attend, not only to what has been declared to be the opinion of the Lords of Session, who have decided with respect to what a father is bound to do after a son attains the age of majority; but also, how far the Court do or do not actually interfere in what he does with respect to the expectations of the son, previous to his attaining the age of twenty-one years. It is quite obvious with respect to what a father may be called upon to do, after a son attains the age of twenty-one, that what may be proper to be done with reference to a son educated in one way during his minority, may or not be proper with respect to a son educated in another way, or with reference to the maintenance of that son after he has attained the age of twenty-one. 'And that he is entitled besides, as the lawful son and presumptive heir of the father, to a suitable aliment and maintenance out of the ample estates that belong to him:'—the pursuer stating his claim, as a claim resting on two grounds; first, That he is apparent heir of entail to his father,—and I repeat the words, 'apparent heir of entail to his father' again, referring to the particular expressions to be found in the Act 1491. 'And that he is entitled to a suitable aliment and maintenance out of the ample estates that belong to him,'—resting his claim, as your Lordships observe, both upon the parental obligation, and also upon the obligation which is understood to result from the relation which each of the parties bear to the estate, of which the one is in possession and the other is in expectation.

Then he states, 'That the only provision which the pursuer's father has made for his support, has been to settle upon him L. 100 a-year,

‘and to obtain for him an ensign’s commission in our 79th regiment of foot, which he at present holds. That the defender, ever since the month of May 1819, harbouring a groundless dislike against the pursuer, refuses to provide for the aliment of the pursuer in a manner suitable to his early education, present rank, and future prospects as apparent heir of the lands and estates of Panmure.’ My Lords, with respect to this allegation, namely, that the defender harboured a groundless dislike against the pursuer, we may throw that entirely out of the question; there is no proof of it; the evidence on that point does not appear to me to have the least reality.

Then it alleges, ‘That though the pursuer has often and divers times desired and required the said William Maule, defender, to grant him such reasonable aliment, proportioned to the rents and produce of the lands and estate, as to enable him to support his rank suitable to his education and quality in life, and for the maintenance of the pursuer; nevertheless he refuses, or at least delays, so to do.’ And then there is this allegation, ‘And seeing that by the law of nature, as well as the laws of Scotland, the pursuer, as representing the noble family of Panmure, and as next in succession to the lands and estate of Panmure after the defender, is entitled in the mean time to be alimented out of the proceeds and profits of the lands and estate, in a manner suitable to his rank and station,’ and the claim is then put on the laws of nature as well as upon the laws of Scotland. I should apprehend that this claim to be alimented in a manner suitable to his rank and station, by the law of nature as well as the laws of Scotland, will finally be found to rest upon the law of nature, and that it does not rest upon the laws of Scotland.

Then it prays, That it shall be declared by the Lords of Session, ‘that the pursuer is entitled to a suitable aliment from his father ex debito naturali, and that he is in the mean time entitled to a maintenance for himself, and to an aliment suitable to his elevated rank and station, out of the rents, produce, and profits of the estate, whereunto he is entitled to succeed after the defender, in terms of the rights and investitures of the same.’ And then it prays, that the father might make payment to the son ‘of the sum of L. 2000 yearly, as a reasonable and suitable allowance, according to his rank and station, for the support of the rank of the family to which he is entitled to succeed, or such other sum as the Lords of Session may think fit and reasonable in the circumstances of the case, and this during all the years and days of the lifetime of the defender.’ So that the prayer of this summons, your Lordships observe, is, that this gentleman claims and insists that he ought to be declared entitled to a suitable aliment from his father, and that he ought to have L. 2000 a-year, or such annuity from his father, as the Lords of Session should think a father ought to make to him as the son of that father during the joint lives of the father and the son; and of course, as it seems to me, submitting to the Court of Session a case, in which, if they can determine that the

June 1. 1825. father shall, upon the grounds here stated, in the next year pay to his son a sum of L. 2000, they must have a jurisdiction from time to time, as long as the father and the son live, upon the application of the son to have the annuity increased, to give him an increase; or upon the application of the father, disclosing all the changes in his circumstances with respect to this family, to have a decrease made from time to time. My Lords, the defence which was put in for Mr Maule, the father, was to this effect, that he was possessed of a fee,—these are words which would create an estate tail in our law,—the whole estate was limited to his heirs in strict settlement; ‘but by the provisions of that entail,’—that is, the entail of Panmure,—‘events, over which neither of them ‘have any controul, may entirely deprive the pursuer of any chance of ‘the succession to that estate,’—which is a material circumstance when so much is to depend upon discretion—I say discretion, looking to the nature of the property which the father at the time has, and which the son at the time may have a right to succeed to, but which in certain events he may not have a right to succeed to. He then says, that ‘the defender has always acknowledged and performed his duty ‘as a father in educating and alimentering the pursuer:’—And I observe, that one of the Lords of Session, adverting to this passage, did state, that it was unnecessary for him to consider whether the law of Scotland subjected a father to this duty of educating and alimentering his son after he has attained the age of 21; because the appellant has acknowledged that this is his duty. Now I do not apprehend, at least in our law, it would have that effect. I conceive, that if a man had so acknowledged what he conceived to be the doctrine of law, that the Court here would not consider that as being the law, merely because he had acknowledged it. The admission of a fact is one thing, the admission of a doctrine of law is quite another thing. ‘He gave him, he says, an excellent ‘education, and purchased a commission for him in the army. In other ‘respects, the defender has made such allowances to his son, as he concluded (by the advice of the Colonel of the regiment, and other eminent ‘officers) to be proper and adequate to his situation in his profession.’ And I observe that this allowance, in reference to the station he held in the army, was an allowance represented to have been made by the advice of a very eminent person,—I mean Sir John Moore, and other persons to whom reference was made, it being conceived by them to be adequate to his situation. Then he further alleges, that ‘while the ‘defender is ready to perform his duty to his son, he denies the competency of the present action; and maintains, that the pursuer has ‘no right, as an heir of entail, or in any other character, to apply to ‘this Court,’ that is, to the Court of Session, ‘and desire them to interpose between a son and a father, and assume the discretion of ‘measuring out and apportioning the aliment which he shall give him. ‘It is the defender’s duty to alter, vary, or increase, according to the ‘existing circumstances, that aliment he, as a father, may think most ‘advisable in the particular case; and while he is willing to perform

‘it, he submits that a Court of law is not called upon or entitled to exercise any jurisdiction in the matter.’ June 1. 1825.

My Lords,—The parties having represented their arguments in the memorials and petitions which have been laid upon your Lordships’ table, the Court of Session proceeded to decide upon this matter. The first interlocutor appealed from is expressed in these words:—‘The Lords having advised the mutual memorials for the parties, they repel the defences pleaded for the Honourable Mr Maule, and find him liable in a suitable aliment to the pursuer; but before farther procedure, appoint the defender,’ that is, the father, ‘to give a condescendence of his free income.’ The expressions to be found in this interlocutor which call for attention are, first, the words ‘a suitable aliment.’ In what respect the amount of that aliment was to be fixed, so as to entitle it to the character of being a suitable aliment, this interlocutor in no manner explains; except so far as you can consider it to be an aliment that a Court ought to consider as suitable by what should appear upon the condescendence of the father’s free income.

Another interlocutor was afterwards pronounced in these words:—‘The Lords having resumed consideration of this process, and advised the same with the condescendence for the defender, modify the sum of L.800 sterling for aliment to the said Fox Maule the pursuer, and decern the defender to make payment thereof at two terms in the year, Whitsunday and Martinmas, by equal portions, commencing at Whitsunday last for the half-year immediately preceding, and the next term’s payment at Martinmas next, and so forth half-yearly thereafter, during the joint lives of the pursuer and defender, or until the said aliment shall be altered or recalled by this Court. Find the defender liable in expenses of this process.’ What, therefore, is pronounced in this interlocutor as the law of Scotland is this, that upon the representation made by Mr Maule in the condescendence stating his income, the Court was of opinion that they had a jurisdiction which authorized them to state to the father, that L.200 a-year (that is, the amount of an ensign’s pay as an officer in the army, and L. 100 a-year which the father allowed him) was too little, the father thinking it enough—and the father I see intimating a disposition to purchase in the army in case an opportunity offered; but they thought themselves justified in ordering L. 800 a-year to be paid during the joint lives of the pursuer and the defender, or until the aliment should be altered or recalled by the Court. The terms, therefore, of this interlocutor embody what may be stated to amount to a judicial declaration, that at present the father had no discretion, but that he must allow L. 800 a-year; and that the power of altering or recalling that did not rest with the father in any circumstances that might occur in the course of the joint lives of the father and son, unless the son chose to agree to what the father so proposed; but that, on the contrary, the Court itself was, during the joint lives of the pursuer and defender, to take upon itself to determine what

June 1. 1825. was not to be allowed more or less than this L. 800 a-year between the father and the son.

My Lords,—Taking the law to be as it is expressed in this interlocutor, it must be considered to have been pronounced to be not only the law as between Mr Maule and his son, but the law as between all persons standing in this relation to each other, under all circumstances; namely, that the Court has a jurisdiction, wherever the son of a parent—any son of a parent, (for I do not see how, if it is to rest on the natural obligation, another child may not apply also)—called upon the Court from time to time to oblige the parent to inform the Court of Session what are the circumstances of that father, what property he has, what is (as they express it) his free income, what debt he has; because it is not a mere statement by him that such and such is his free income that will do, they must have a right somehow or other to determine what is his free income, in order to ascertain what allowance can be taken out of that free income to his son; and then they must, during the period which the annuity is directed to be paid, until altered or recalled, have a right to take cognizance of this at the instance of the son, on the one hand, to call upon his father *de anno in annum* to state to the Court of Session, and to the world, his circumstances, as they vary from time to time, for the better and for the worse; and that, on the other hand, the father is put under the necessity, if his circumstances change for the worse, of applying *de anno in annum* to the Court of Session, representing what that unfortunate change of circumstances is, and to publish them to the world, and then of calling upon the Court either to recall the allowance altogether, looking at the change of circumstances as operating a dissolution of the parental obligation, or looking at the change of circumstances as so far diminishing the extent of parental obligation as to call for a change favourable to the father. It should seem also, that if the parental obligation is to be looked at as founded on the law of nature, it must be regarded not only as an obligation between the father and the eldest child, but as an obligation which the father must be considered as being under to every child; and therefore, that in every case the Court of Session, if it is to determine what allowance ought to be made to the eldest son, must have some regard to what is the extent of the obligation which the father must be under in reference to every other person to whom he owes the same species of obligation; and that if it can be fixed in the beginning, for instance, of the year 1825, inasmuch as the parental obligation must require more or less according to the changes in circumstances of every other child in which the parental obligation is to be looked to, that must vary *de anno in annum*; and therefore, in truth, the question comes to be this, whether the Court of Session has a jurisdiction, on the application of a son, to take into its own hands, as between the father and that son, and the father and his family, all the duties of a father of a family; and to state that, upon application once made to them, the whole administration of that family may be placed under

their hands, and may remain there as long as the natural obligation of June 1. 1825. the father and the son exist.

My Lords,—I should mention, however, to your Lordships what is the state of the property as given in under this defence to the Court of Session. In obedience to the interlocutor the defender condescends and states the particulars,—that the gross income amounts to L.19,513. 17s. 2d.; that from this there is a deduction, as therein particularly stated, of L. 8998. 7s. 1d. upon the estate; that the true income, therefore, amounts to L. 10,515. 10s. 1d. He then states, that the capital of his debts, the interest of which is stated in the account as a deduction, is L. 29,576. 19s. 11d. Your Lordships will permit me to observe, that it is the interest of this debt which is stated as a deduction; but the capital of this debt is what the father owes to the creditors, and the capital of this debt being a sum of L. 29,576, in considering this question, what is or is not a fit allowance, one should think it natural and proper to have regard to that fact, that the person who had that income owed a debt amounting to pretty nearly three years' gross income of his estate; and that, in considering what it was proper for him in a moral view as a parent to do in respect to his children, it was not altogether unfit to have it considered what in a moral view, as between the father and his creditors, he ought to do for those creditors when he is determining what he ought to do with respect to his children; and this the rather, because, unless I misapprehend the circumstances of this case, this gentleman has not the power of charging for those creditors one shilling of that capital upon the estate: and how far the Court, judiciously determining what it is fit for a moral man to do, is to say, You shall not make a just provision for your creditors, but you shall make a certain provision for your children,—is a question which may admit, to say the least of it, a great deal of consideration.

Then he says, there are claims likewise for damages brought against him by the upper heritors on the river Tay, on account of the tenants of his salmon fishings having used stake-nets, and those are now in dependance: That there is likewise in dependance an action at the instance of William Maule, Esq. of Kilminny, against him for eviction of parts of his estate;—what parts of the estate those were in respect of which that action was brought, does not appear in the condescendence. Then he says likewise, that he was a cautioner for different friends to the amount of a great many thousand pounds, the effect of which it is impossible to estimate; and certainly one should apprehend some regard ought to be had likewise to the consideration of this fact.

My Lords,—When the learned Judges came to decide what was to be done upon this condescendence, they seem to have formed very different opinions. The mode in which this allowance was made by the Court, was represented at the Bar to be something like an auction. The *Lord President* says, 'You have the condescendence 'by Mr Maule; the statement is acquiesced in; the free income 'comes to be clear about L.10,000 a-year';—that is a proposition to

June 1. 1825. which I think it is a little difficult to agree to, considering what has been stated in respect of the debt. 'You have now to discharge the disagreeable duty put on the Court by the law, of putting our hands into another man's pocket. There is no help for it; but the Court is always very properly as moderate as possible in exercising such power; perhaps about L. 600 a-year is a proper aliment to be awarded in this case.' Then another Lord of Session says, 'I think it rather too little—the sum to be awarded this gentleman should be L. 800 per annum at least, or L. 1000. I really conceive the allowance proposed is too small; L. 100 over or under cannot be of much consequence to the father. We all know we must make this aliment suitable to the condition and society of the parties; and we all know how little way a sum of this kind goes in a particular sphere of life; and there is no impropriety alleged or insinuated as to the son's conduct.' My *Lord President* observes on that, 'He has no family.' The Lord who mentioned L. 1000 then stated, 'It is material a young man of that rank should keep a certain rank of life. A certain kind of manners are only to be acquired in a certain society,—all the learning in the world will not give them,' that is, the manners; 'and that society is not to be kept but by a certain expense; even the common necessities of life are a source of considerable expense to persons in that rank of life. I confess I think we should award a larger sum than that which has been proposed.' Then my *Lord President* says, 'What do you say, Lord Gillies?' *Lord Gillies*, 'I am ready to acquiesce in any thing which your Lordship suggests; I have nothing to say.' Then *Lord Hermantl* said something, but the reporter could not hear it. Then *Lord Gillies*, 'L. 700.' *Lord Balgray* says, 'I would prefer L. 1000. It is the meaning of the Court to give a suitable aliment.' *Lord President*, (to *Lord Gillies*) 'L. 800?' *Lord Gillies* nodded assent. The *Lord President* then said, 'The Court awards L. 800.'

My Lords,—This case will fall to be determined by reference to the Act 1491: that statute which has been referred to is the 25th statute of the reign of James IV. passed in 1491. The words of that statute are these:—(Here his Lordship read the statute).

This Act of 1491, I see, it has been contended, applied only to cases in which personal estates were in ward; and that has been insisted upon considerably, not only from what is in the beginning of this short statute, but more particularly from what is at the end of it; 'and ane reasonable living to be given to the sustentation of the air, after the quantitie of the heritage, gif the said air has no blanche ferme nor feu ferme land to susteine him on, als weil of the waird's lands that fallis in our Sovereign Lorde's handes as ony uther.' And it is contended, with a good deal of colour of reasoning, that if we had been talking in 1492, we should have said that this statute really meant only to provide for those cases in which an estate was in ward, and that there the person who had the estate in ward was to give a reasonable sustentation to the

heir whose estate was in ward, provided the heir had nothing else out of which he could be sustained: but there appears to be in the beginning of this statute these words, 'lands given in conjunct feftment or liferent, als weil to burgh as to land.' And although the last clause of the statute seems, in the terms of it, to have no reference whatever except to estates left in ward, those formal words, 'lands given in conjunct feftment or liferent, als weil to burgh as to land,' have been construed to create an obligation in this way on the possessor of the conjunct feftment and liferent to sustain, by a stipulated allowance out of the heritage, the person who was to take after him.

My Lords,—I may have occasion, in the course of what I shall have the honour to address to your Lordships, when we come to look at the text writers, and the cases on this subject—and many of the text writers treat on the subject,—and the cases being very very many upon the subject, all of them, to the best of my power, I have made a point of reading,—I shall have occasion to point out to your Lordships, from some of the cases which occur in the text writers, or the cases themselves, that they admit that the Court of Session have, in the progress of their proceedings, applied this statute as the rule of what they are to do in cases to which, as it appears to me, the statute has no reference, unless you can say they are in *pari ratione*, and on that principle, that you could so apply them. Give me leave to remark in this stage, that if we were talking in the year 1492, it could not be contended that Mr Maule the father has the estate of his son in ward, nor could it be contended that Mr Maule the son had a contingent fee, nor that Mr Maule the father was a liferenter of this estate, for he is the absolute feoffer of the estate, subject to what is contained in the deed of entail, as it seems to me; therefore, regard being had to what is the interest of the father in this estate, and what is the interest of the son in this estate, the question for your Lordships to decide will be, Whether this decision of the Court of Session is right upon the ground of any obligation that arises out of the settlement, or out of the nature of the estates which they might respectively be said to have? if these are the proper terms to apply to a case where one has the whole estate, and the other (the son) will have a right to have the whole estate? or whether this decision is right upon the ground of the *jus naturalis*? and whether it is right as to such doctrine as would obtain in any system of law, rather upheld as the system on which the Court of Session is to act upon the *jus naturalis* of the son, as contrasted with the *patria potestatis* of the father? for it may, perhaps, become a matter of some difficulty, of more difficulty I confess, as it strikes my mind, than it has appeared to those whose decision and whose doctrines I have had occasion to look into, how you are to infer either from the Act of Parliament, or by analogy from what you find, that in respect of persons who have estates expressly referred to in the Act of Parliament, or who have property which is not expressly referred to in this Act of Parliament, you are at liberty, *pari ratione*, to fix

June 1. 1825.

June 1. 1825. on one person having the estate, an obligation in respect to another person that may hereafter have the estate. On what is that to be founded, unless there is some pure, unlimited, and unfettered discretion in a Court of justice, to say they will create analogy between cases of that sort, and the cases where the father is intrusted by nature with the education of his son while he is a minor? The father must, as it seems to me, because he is intrusted with the education of his son, be, in all human probability, as much better judge of what is proper to be done at the time he becomes a major, than any Court on earth can be.

I think I have now stated to your Lordships enough to bring to your knowledge what the question is in this case. It is impossible to discharge one's duty without humbly calling on your Lordships for the application of a good deal of time to the consideration of stating what must be stated on the subject in matter of doctrine. I shall therefore conclude to-day, by only stating again to your Lordships, that the real question, as it appears to me, is this, Whether, in such a case as this, under the particular circumstances of such a case as this, the *jus patrie potestatis* in this family no longer belongs to Mr Maule, but belongs to the Court of Session? and whether, in the suit instituted by the son after he became major, there is this discretion to the Court of Session to judge, *pro hac vice*, what shall be done between the father and the son;—that the Court of Session has (what it must necessarily have, if this decision be right) a right to say from this moment, until either the father or the son shall drop into their graves, what is the extent to which the son is to have, or is not to have, a demand on his father to participate in the enjoyment of his property, regard being had to all the circumstances which affect that property? That is the question that your Lordships have to determine; and let it be remembered, it is a question which goes to all land-owners in Scotland, whatever distinctions may be taken between land-owners and claimants of money; for there is a distinction between land and money in this respect. It is a distinction which, when taken, may nevertheless affect monied property; and while that distinction has effect, it is a distinction which ought to be acted on, and it seems difficult to say, that many of the cases reported do not prove that the distinction has existed. I have looked into those cases, which are cases that require a good deal of consideration of another nature; for where your Lordships knew, that, by the practice, there is a sort of discretionary right which has been declared in matters in Scotland as to the doctrines of trust, and as to portions of children, and in respect of many other matters which are rather considered in this country as matters to be decided in a domestic forum than in any Court of justice, we must take care, whatever our decision in this case is, not to touch much upon what may be called the established law of Scotland,—repeating again, as I did at first, that whatever might be your Lordships' opinion on the law as applied to this case in judgment, if it be the law, you must

not alter it in judgment. But when one puts the question in that way, one is fairly entitled judicially to say, that if the law be attended with all the consequences, to which I hope I did not do wrong in adverting, before you affirm that such is the law in this particular case, you ought to be really satisfied that it is the law in this particular case. June 1. 1825.

LORD CHANCELLOR.—My Lords, In this case of Maule and Maule I have already endeavoured to state to your Lordships the facts of the case, for the purpose of satisfactorily explaining the nature of the questions your Lordships have now to decide; and in stating the deed of entail which is mentioned in this case, I have particularly taken notice, that the Earl of Dalhousie was a liferenter, and that the father of the present respondent had an estate destined to him and the heirs-male of his body. Taking notice therefore of the distinction, that he was not merely a liferenter, I have also pointed out to your Lordships' attention that the author of this entail had directed that Mr Maule was to have L.500 sterling when he reached the age of fourteen from Lord Dalhousie as liferenter; and when he came to the age of twenty-one, he was to have an additional annuity of L.500, making L.1000; and in case he married, he was to have a further additional annuity of L.1000, making in the whole the sum of L.2000 sterling yearly; and I take notice of this circumstance, because I observe it in the notes of the Judges which we have as to what passed in the Court of Session; some of the Lords of Session allude to this circumstance as a circumstance upon which they might very much rely in directing the augmentation of alimony which their decision has given to Mr Maule the respondent.

Now, my Lords, the author of this settlement that created Lord Dalhousie a liferenter on whatever estate he had, being the author of this settlement, might direct any payment he thought proper to be made to any particular object of his bounty,—that forms the law between these parties; and to argue from the instrument that creates the obligation upon a particular person to whom the bounty is given, the gift of the estate—to argue from that obligation, resting upon him by the express terms of the entail, that therefore an obligation of a like kind, though not of a like extent, should rest upon others who are to take the properties under the same entail, where no such direction is given, appears to me not a very conclusive way of arguing that question as to them. What obligations they are under, is not to be inferred from the obligation in the entail. Where there is an express obligation upon one person in a deed, but which omits to throw any obligation upon the other, it is very difficult to argue that the other was under the same obligation, as no such obligation was expressed in the instrument; and upon the papers before your Lordships, your Lordships will discover there is a provision about the heirs of tailie coming into possession of the peerage, and that this estate is to be divested when they come to the age of fourteen; and therefore, although there was no

June 1. 1825. divesting directed as to the Earl of Dalhousie, there was a divesting under which this estate would have gone to a person when he arrived at the age of fourteen, and that would account for the obligation in the one case and not in the other.

But, at all events, the question decided in these interlocutors must be a question that turns upon the law of Scotland, and not upon the rule given in this entail, as to the person with reference to whom no such provision is made; therefore, if the decision now in question is right, and I do not repeat to your Lordships the extreme importance of it as to family settlements, it must be right under the construction of the Act of 1491, or it must be right upon the doctrine of the *patria potestas*, the obligation that a father is under *ex debito naturali*, and the relation in which children stand to him by the *jus naturale*, to make or not to make such provision, as it is contended in this case has been adjudged ought to be made by a father for a son above the age of minority, or a gentleman having a commission in the King's service, and having an allowance to the extent I have mentioned on a former occasion from that father; and I would observe again, upon the terms of these interlocutors, that they direct the father to give in an account of his free income. Now, if the Court has a jurisdiction to say that a father shall, during the joint lives of himself and his son, make such an allowance to that son, not as he the father thinks right, but as the Court of Session think right and suitable to the rank and fortune of the father, and the expected rank and fortune of the son, it does appear to me there ought to have been a great deal more inquiry made as to what constituted the free income of the father; because, if the father is by the *jus naturale* bound to provide for one child, he is bound to provide for all his children; and he is bound, not by the *jus naturale*, but by every moral view, to take care of his creditors. He must attend to all his relations in life, to know the extent of the obligation resting upon him that arises from any one particular relation. And accordingly it must be quite obvious, that if the Court has jurisdiction in 1824 in the case of a father having an eldest son, who had attained his age of majority, and eight or ten other children in their minority, but who may, from time to time, in the course of that minority, require, for the purposes of education and sustenance, more and more from the father, where the demands are increasing upon him from time to time,—in order to see if you have this sort of jurisdiction, as what is right between the father and son, you must judge what obligation the father is under as to all the others, upon the same principle upon which a son, as a son, can form a demand upon a father, as a father. I observe in the reasoning upon this, there is a great mixture of the consideration as arising out of the Act of 1491, and the *jus naturale*; it becomes necessary therefore just to put your Lordships in mind again, that Mr Maule is not a liferenter,—that Mr Maule is not a person having an estate in his possession which may be said to be in ward.

The Act of 1491 runs in these words:—(Here his Lordship read

the statute). The words which are in the former part of this Act of Parliament, 'lands given in conjunct fee or liferent,' are expressions that do not suffer much by the concluding words in this Act, because the concluding words, *prima facie* at least, apply to no one but the heir whose estate is in ward to the King. That has, however, been long applied in Scotland to the case of a liferenter, and what that liferenter's obligations are in respect to the heir to take after him. There has been a good deal of reasoning in this case founded upon those decisions, which apply to the case, not of a superior who has got lands in ward, but to a liferenter with respect to the person who is afterwards to take under the same vestment.

My Lords,—It is impossible, I think, not to perceive and to feel, that in arguing a case where a father is neither liferenter, nor has an estate in ward, that the principles of this Act of Parliament, which have been alluded to as furnishing something of a rule as to the nature and extent of the obligation that arises from the rights and duties of a parent, and as applying to the *patria potestas*, has no relation to a consideration of that kind: and I cannot help feeling what is stated in one of the cases under the head of aliment, (*Lyon against Gray*, 16th January 1712), that Sir George Mackenzie, in his observations on that Act of Parliament, reasons against the extensions that have been made of the doctrine with great freedom; that the decisions on which the authority *rerum judicaturum* stands, have not been uniformly one way: but this is the fate of all decisions that arise from no certain principles of law; and as to such, all occasions are to be taken to restore them back to the true principles of justice and equity. In truth, that may be said of all judicatures; and therefore I desire not to be understood as applying this observation to the judicatures of Scotland alone: but there certainly have been very considerable stretches of authority adopted with reference to Acts of Parliament, the language of which is quite clear as to the cases to which those Acts ought to be considered as applying; for instance, here to the case of an estate in ward, or taking the Act to apply to a liferenter, or the heir of the heir of a liferenter, you have reasoned upon the principles that the Legislature have applied to those particular cases, to form rules and adopt measures which such Acts of Parliament by no means authorized you to adopt: and I cannot help, therefore, thinking, that in the present case the question before your Lordships is this, whether, under the circumstances of the present case, regard being had to all the decisions you can find—taking this case as a case between father and son, as a case where the father is not a liferenter, where the father has not the son's estate in ward, but where the limitation of the estate being to the father and the heirs-male of his body—you can apply those principles that have been applied in the construction of the Act of 1491, to a case in which it seems to me the obligations to be fixed upon the father are obligations which must be taken to arise from the *jus naturale*, and not from the circumstance that

June 1. 1825. that the estate in possession is so and so. The question then would be this, whether all the decisions taken together are decisions that authorize you to say, that the Court of Session is empowered, upon the principles of the *ius naturale*, and the doctrines that belong to the *patria potestas*, where the eldest son is provided for, whether they have a right to assume, in a case circumstanced precisely as this case is—for I desire not to be understood to give any opinion upon any case not exactly the same in its circumstances—whether they have a jurisdiction to say, Mr Maule's eldest son being provided for by a commission in the army, and having an allowance of so much a-year from his father, "We do not think that allowance is what Mr Maule ought to make to him, regard being had to his rank in life, and to the quantum of the estate which Mr Maule his father has; and we will, therefore, take upon ourselves to say, in a suit instituted in any given year, that we will administer as between the father and the son the portions—for in truth it comes to that,—the respective portions in which that estate is to be enjoyed between the father and the son during the remainder of the joint lives of both;" an administration which is perfectly incompetent for the Court to take upon itself to make, without examination at the time the parties come into Court, and by examination from time to time, and at a variety of times, when any one thinks proper to apply to the Court, into the circumstances of the father as well as the wants of the son.

My Lords,—To state that there are not cases—nay, not many cases—which go to shew that, upon some ground or other, jurisdiction to this extent has been assumed, is a great deal more than can be alleged. On the other hand, if you look at the cases, taking them altogether, the impression upon my mind is extremely strong, that they are very contradictory in this respect. I think you will find a case in which a person, placed in the military service, was held to be provided for; and there is a case applying to a gentleman at the Bar, where a mother having brought her son up to the Bar in Scotland, after he was an advocate,—I think it is the case of a mother and son, but it makes no difference,—he applied to the Court of Session to call upon her to give him aliment, which they did. We have sometimes heard—I dare say there is no truth in it—that when questions formerly arose in our Courts upon dower and courtesy, it was asked, how comes it that the husband has courtesy upon the wife's equitable estate, but the wife has no dower upon the husband's equitable estate? The only answer that has been given to that is, that the Judges were males and not females; and, therefore, they decided in favour of themselves when they decided against the other sex. Whether that had any effect upon the Judges in that case, I cannot undertake to say, but they give a reason perfectly founded in truth for what they do. They put that case upon this—and I know it in my own person to be perfectly true—that if a gentleman bring his son up to the Bar, in as much as the race is not always to the swift, nor the battle to the strong, there is many an advocate,—I do not say of myself the few

June 1. 1826.

words that follow,—there is many an advocate who deserves to be employed, who is not employed at all : One part of that has been illustrated in the case of the person who is now addressing your Lordships—whether he deserved any employment is another thing : But in that case the Courts go upon this, that a parent having placed his son in a respectable profession, the son, deserving a great deal of employment but having none, and being unprovided for, they conceive the parental obligation to exist as between the father and the son, though the son is at years of majority, if the son is not otherwise provided for. Your Lordships very well know, in that respect, the law of Scotland goes a great deal farther than our law goes, because the obligation of the father to maintain the child is of a very small extent in England, after he comes to years of majority ; but the true question is, whether all the circumstances put together do prove this, that the Court has a right, in a case where the circumstances of it are precisely such as are the circumstances of this case, to go the length that the Court of Session has gone.

My Lords,—See how it is reasoned with respect to the persons in different situations of life. It is said, that a father who brings his son up to the army, must make such a provision for him as will enable him to travel all over the world to see the works of art—foreign countries : He must be a great mathematician, and learn every thing,—that his father must be at the expense of all that. They say indeed, (and here I cannot agree with them), that the law is learnt all at once, but that military service cannot be learnt except in a long course of years. I do not know how it may be as to Scotch law, but I have been very nearly fifty years in learning English law ; and if I am to admit the justice of the remarks of other persons who know very little of law, but are very ready to express their opinions,—if I am to accede to their opinions, even at this period I know very little of it,—that I have forgotten a great deal of it is most certain,—but I cannot agree that a legal education may not require as much time as a military education. Of the one I know a great deal,—of the other I know nothing except when I had the honour of being a volunteer in the Lincoln's Inn corps ; but it does appear to me from what I do know of it, that I could learn to be a soldier much sooner than I could learn to be a lawyer ; and therefore I take the liberty of differing from the learned Judge who has expressed that opinion. But, upon the whole, it does appear to me, that the circumstances do not authorize the Court to go to the extent that they have gone. To go through the whole of the cases would be only reading to your Lordships the decisions that are to be found in the books,—the question is, whether it is possible for you to say, that a Court of judicature is to take upon itself, in a case circumstanced as this case is—and I desire to have it again expressed, that I confine my opinion to this particular case, and this particular case only, taking leave to say that I do so, because, though I find a great many cases that go much farther, I think, than is pro-

June 1. 1825. bability I should be induced to go, yet there are cases which, from what has been said, we shall be obliged to hear, but I do not think any case has been established that calls upon your Lordships to affirm this judgment to the extent of this judgment; and upon these grounds I cannot think that it is advisable that your Lordships should say, under the circumstances of this case, that the law of Scotland has, with respect to the family of this Mr Maule and his son, put matters into this situation, that the judgment and the discretion of the father no longer belongs to him, but that that judgment and discretion, as long as he lives, is to be exercised in a Court of justice, and that you are to remit to a Court of justice from the moment the son comes to the age of twenty-one. Under the circumstances that this young gentleman stands, you are to place in a Court of justice the right to decide upon the manner in which a father shall administer his estate and property between his eldest son, his creditors, his younger children, and all others to whom he owes a natural or moral obligation, during the rest of their joint lives,—is a proposition I cannot hold; and I only repeat what I said before, that if I found it so decided in any case that had a direct application to the present, (although I think if such a law existed it ought not to be suffered to endure a moment longer, but it must be corrected by the Legislature), still I do not think there is any thing that compels us to adopt that decision, when we are acting, not as Legislators, but as Judges; and therefore, in my opinion, this defender ought to be assolizied.

LORD REDESDALE.—My Lords, Before I say any thing as to the case now before your Lordships, I would say a word upon the accusation which has been brought against Courts of Equity, for having determined that women are not entitled to dower of their husband's equitable estates, but that men are entitled to courtesy upon the equitable estates of their wives. That was a question that was very much considered. The Judges at first determined otherwise, but they were compelled to alter their judgment for this reason, because there are certain persons called conveyancers, who have been, for a vast length of time, advising purchasers that they might take estates of that description without being liable to dower, the husband being capable of alienating the estate without the wife; but with respect to courtesy, the wife could not alienate the estate without the husband. I have often heard the same thing observed, and I think it is a false accusation against the Judges of the Court of Equity, as many of those accusations are.

The question in this case is really whether, by the law of Scotland, a child can by this suit compel a parent to make an allowance for the maintenance of that child? and supposing such suit can be instituted, and the parent can be so compelled, in what circumstances, and to what extent, that is to be done?

My Lords,—This has been argued upon two grounds,—the moral

June 1. 1825.

obligation of the parent to maintain his child, and the supposed obligation, also arising reciprocally upon what we find in the cases the supposed law of tenure under the law of Scotland, as is to be collected from the statute 1491, which has been mentioned by the noble and learned Lord. The moral obligation is, I believe, the law of every country, that is, that the father is bound to support his children so far that they shall not be a burden upon others. That is the extent of the obligation, according to the law of most countries, as far as I have been able to ascertain. My Lords, accordingly, whatever may have been the cases which have been determined, some of which go one way and some another, it does seem to me that the rule is properly laid down by Lord Kames, that the whole goes to this,—support beyond want,—and that all that is beyond that is left to parental affection. And if we look into the text writers, Stair, Bankton, and Erskine, all seem to hold the same language; and therefore the construction I put upon the cases that have been decided seems to me to be that which was the construction put upon them by my Lord Kames. That the decisions are various is perfectly true; but when that conclusion is drawn from them by all the text writers upon the subject, it does appear to me that that is what your Lordships ought to abide by.

My Lords,—There has been a considerable allusion to what is the doctrine of the civil law. As far as I have been able to look into the doctrine as laid down by the writers upon the civil law, the writers of various parts of Europe, they all lay down the same rule,—that all that a parent is obliged to do is to take care that his child shall not be indebted to the charity of others; that the charity belongs to him, and that he shall not throw the burden upon others. My Lords, that that may be different as to persons in different circumstances, and in different situations in life, is perfectly true. Suppose a person of high rank is without the means of maintenance, and he is thrown upon the charity of others, the amount of that charity will be very different in that case to the amount of charity that in such instances would be bestowed upon the child of a labourer; but that is the whole difference according to what I can collect either from the civil law or the commentators upon the civil law, and other writers, or the text writers upon the law of Scotland. That this case goes infinitely beyond that is unquestioned, for the provision made by Mr Maule for his son was purchasing for him a commission in the army, and an allowance of L. 100 a-year. Is it possible to say, under those circumstances, the son is in want? *Prima facie* there is no obligation to go beyond that. Upon what is the obligation to go beyond that founded in this case? Upon the extent of the father's property; and for that purpose the Court goes into a minute inquisition as to what is the income of the father, as the noble and learned Lord has observed. They have not entered into an inquiry what are the other obligations of the father, although it should appear to your Lordships he is in debt to the amount of L. 30,000, for which he has not any means of payment but his interest in this estate, which

June 1. 1825. will terminate with his death, and may terminate sooner, if he has the misfortune to become a peer instead of a more affluent commoner.

The statute 1491 has been observed upon in this case in a most extraordinary way; it is most clear, that it has no relation whatever to the case of a liferenter. It has no relation whatever. The title of the statute is—though I believe the title is not a part of the statute—the title is, ‘The wardator sall not destroy the landes, he said susteine the mi-
‘nor;’ and it is ordained, ‘that where any land or landes happen to fall
‘in ward to our Sovereign Lord, or any other Baron of this realm,
‘spiritual or temporal, or lands given in conjunct feofment or life-
‘rent,’ he shall maintain the minor. Therefore this title shows, that the person who corrected this statute, and gave it this title, meant the maintenance to apply to the wardator, that is, the person who had the lands of the minor in ward, and by the very law which gave him a right of ward, compelled him to sustain the minor: it was as much an obligation upon him to sustain the minor, as it was under the entail of this estate for Lord Dalhousie to sustain Mr Maule; it was part of the law under which the wardator held the lands; and therefore to say that, by the language of this statute, the liferenter is to maintain a person who is no relation to him—for that is the reasoning, that if the person is liferenter of an estate, the next taker is entitled under this statute to maintenance—is the most monstrous misconstruction of an Act that was ever brought under the view of a Court of justice; it is clearly so treated by the ablest writers, and particularly by Sir George Mackenzie.

My Lords,—Only conceive what is the consequence that would arise from your affirming this decision. Would you not give a ground for every child in Scotland to call his father to an account for not making a sufficient allowance, and to compel the father to disclose all the circumstances of his own affairs, my Lords? a disclosure that might be attended with very mischievous consequences to him?—compelled to do more in many cases, perhaps to disclose all the misconduct of his son, which might shew that the very embarrassments of the father had been produced by the misconduct of the son, or by the misconduct of other children; and a variety of circumstances which really make this appear to me one of the most dreadful cases that can be conceived. I am bold to say, that if this is the law of Scotland, I should be sorry to be under the dominion of the law of Scotland. But I take it not to be so. I take it that the statute has nothing to do with the subject. I take it that the decisions, contradictory as they may be, are against what has been laid down in this case; and that all the text writers upon the subject hold doctrines extremely different from what has been held in this case.

My Lords,—Looking at what has been attributed to have fallen from the Judges in this case, I think it is impossible not to feel the greatest regret that any such expressions should have passed; because it strikes me, that if you are to attend to all the circumstances that

are laid down as the grounds of decision, the endless variety of opinions that are formed upon the subject, no two seeming to agree, we shall leave the law of Scotland in a state of uncertainty, dreadful to every body in the situation of a parent, and mischievous to every one. Upon these grounds I agree with the noble and learned Lord, that the judgment ought to be reversed, and the defender assoilzied. It is a case between father and son, and therefore no costs should be given.

June 1. 1824.

Appellant's Authorities.—3 Ersk. 9. 16, 17.; Kaim's Pr. Eq. p. 80.; 25 Voet, 3, 4.; Maidment, May 27. 1818; 6. Dew, 259.; Mack. Ob. p. 101.; Moncrieff, Jan. 27. 1736; 3. Stair, 5. 3.

Respondent's Authorities.—Dig. 25. 3.; 1. Stair, 5. 7.; 1. Ersk. 6. 56.; 1. Bank. 6. 13.; 4. Bank. 45. 17.; Dick, Jan. 13. 1666, (400.); Aytoun, July 25. 1705, (390.); Ramsay, July 1. 1687, (391.); Adam, March 1662, (398.); De Courcy, July 3. 1806, (No. 8. Ap. Aliment); 2. Craig, 17. 20.; 25. Voet, 3. 3.

J. CAMPBELL—J. RICHARDSON,—Solicitors.

Duke of GORDON, Appellant and Respondent.

No. 32.

Adam—Abercrombie.

Reverend JAMES GILLAN, Respondent and Appellant.

Keay—Wilson.

Teinds—Title to Pursue—Process—Found, (affirming the judgment of the Court of Session), 1. That a decree of approbation of a sub-valuation, pronounced in absence of the minister of the parish, may be competently challenged by reduction. 2. That the feudal proprietor is the proper pursuer of an action of approbation. And, 3. That the minister who has been presented to the parish, and his presentation sustained, but who has not been inducted at the date of citation, and not the moderator of the Presbytery, is the proper defender.

In 1629 the whole teinds of the parishes in the presbytery of Elgin, including specially the parishes of Dipple and Easil, were valued by the sub-commissioners. These two parishes were afterwards united, under the name of Speymouth, to which the lands of Garmouth, lying in the parish of Urquhart, were subsequently annexed, quoad sacra. The property of these united parishes belonged to the Earl of Fife; but, in 1779, his Lordship exchanged them with the Duke of Gordon, who entered into possession at Whitsunday in that year. Lord Fife, still remaining feudally invested on his infestments,

June 7. 1825.

TEINDS.
Lord Meadowbank.

June 7. 1825. brought, in August 1784, a process of approbation of the sub-valuation. At this time Mr Gillan was minister of Kinloss; but had received a presentation to Speymouth in December of the same year, which was laid before the Presbytery, and sustained on the 6th of January 1785. The summons of approbation was executed against him in July 1785; but he was not inducted until October following. It was also directed against the other clergymen within the Presbytery of Elgin. The summons was blank, and the copy of citation short. When called, Counsel (who was solicitor of tithes at the time) took the process to see. No debate ensued, but, on the 21st November 1792, decree was pronounced in absence of the minister.

Subsequently, Mr Gillan having obtained an augmentation, the Duke of Gordon, who had now completed his titles, proposed to surrender his teinds, in terms of the decree of valuation. This was opposed by Mr Gillan, who also raised an action of reduction of the decree of approbation, on the grounds, 1. That it was in absence; 2. That the action had been pursued by Lord Fife, whereas the Duke of Gordon ought to have been pursuer; 3. That as the parish was vacant at the time it was executed, it ought to have been directed against the moderator of the Presbytery; and, 4. That the sub-valuation had previously been derelinquished by over-payments. The Lord Ordinary found, *inter alia*, 'that there are no relevant grounds stated for setting aside the decree of approbation sought to be reduced, and that the action of reduction ought, therefore, to be dismissed;' and made *avizandum* to the Inner-House.

In the meanwhile, a case, involving the same question, was in dependence between Mr M'Donald of St Martin's and the Minister of Kinnoul, in which the Lord Ordinary (Cringletie) had sustained the action of reduction at the instance of the minister, and Mr M'Donald had brought his interlocutor under review. In the present case, the minister reclaimed; and, when his petition came to be advised, the Court, on the 7th February 1821, in respect of 'the coincidence of this case with another depending before the Court between the Minister of Kinnoul and Mr M'Donald of St Martin's, now ready for advising, they supersede advising this case farther till the other is considered.' Thereafter, in Mr M'Donald's case, their Lordships, 'in respect all parties concerned were regularly cited in the action of approbation and valuation brought by the defender, Mr M'Donald's author, found, that the decret that

‘ followed thereupon in his favour, although obtained in absence, June 7. 1825.
 ‘ cannot now be opened up; therefore recalled the interlocutor of
 ‘ the Lord Ordinary complained of; repelled the reasons of re-
 ‘ duction; assoilzied the defender from the whole conclusions of
 ‘ the libel, and decerned.’ And, upon the same day, the Court
 pronounced the following interlocutor in this case: ‘ The Lords
 ‘ having again advised this petition, the answers thereto and
 ‘ whole proceedings, and having considered and determined in
 ‘ the case of Mr M'Donald of St Martin's above referred to,
 ‘ they refuse the desire of this petition, adhere to the interlocutor
 ‘ of the Lord Ordinary complained of, and decern.’ Reclaim-
 ing petitions were then lodged in both cases by the respective
 ministers; and, on the 22d May 1822, the case of Mr M'Donald
 having come to be advised, the Court ‘ so far altered the in-
 ‘ terlocutor reclaimed against, as to repel the respondent's objec-
 ‘ tions to the competency of the action of reduction, and remit
 ‘ to Lord Kinneder, Ordinary, to prepare the cause, as upon the
 ‘ merits, for the consideration of the Court.’ Against this judg-
 ment Mr M'Donald reclaimed; but the Court, on the 21st May
 1823, adhered,* and, on the same day, pronounced this interlo-

* The following opinions of the Judges in that case were laid before the House of Lords:—

Lord Hermand.—It is stated, that there is a difference between a process of valuation and a process of approbation of a sub-valuation; but I don't see that difference. In the question before us there is a point of great importance: It is insisted, that a decree of approbation, where every thing has been regularly done, and all parties called, shall be set aside, because the minister, though called, did not choose to attend. The evils arising from this not being done may sometimes occur; but Mr M'Donald, when he purchased the lands, saw a decree of approbation *ex facie* regular; and the minister says—an extraordinary thing—that he paid no attention to the process when it was going on. I will not take such a statement off his hand. I would not believe any person who says that he did not attend to his own interest; and the plea has been rejected in cases of valuation where the same objection has been made.

As to the principle, I never heard it disputed, that in such a case, where all parties are cited, it was of no consequence whether one of them appeared or not. A pursuer cannot force a party to come into Court. We don't employ the Roman method, and bring them into Court *oborto collo*. There is a compulsortor to tell him to appear, but none to make him appear. The evils arising from the plea by the minister would be more fatal in an approbation than in a sub-valuation.

As that is my opinion on the preliminary point, it is the less necessary to go into the plea of dereliction; but I may only say, that dereliction not being presumed in law, it must be made out in a clear manner, especially where the valuation is in victual. The over-payments here depend on calculations for a century or more, and it is very difficult to make out that there has been an over-payment. There is a great deal stated to shew, that in the localities no excess was laid on the lands, but even something under. It is not in the power of this Court to set aside the decree of approbation.

June 7. 1825.

cutor in the case: 'The Lords having resumed consideration of this petition, and having advised the same with the answers, they, in respect of the judgment pronounced this day in the

Lord Cringletie.—I was Ordinary in this case; and it appears to me to be a question of great importance, not whether Mr M'Donald shall be considered as having derelinqushed, but whether the decree of approbation shall be held as final and not to be traversed. Your Lordships will look at the terms of the Act of Parliament, on the thirty-eighth page of the minister's memorial: 'Where valuations are lawfully led against all parties having interest, and allowed by the former commissioners according to the order observed by them, that the same shall not be drawn in question, nor rectified upon pretence of enorm lesion at the instance of the minister, &c. except it be proved that collusion was used betwixt the titular and heritor,' &c.

If we were entering into the question, whether this sub-valuation was duly led or not, it would be met by the Act of Parliament. How can he show that there was enorm lesion without the decree being open to challenge? If the minister could lay upon your table a decree of the High Commission, rejecting the sub-valuations, would your Lordships persist in supporting this approbation? I cannot enter into that. Or suppose that he was to lay before you a discharge by the heritor departing from the decree, would the decree nevertheless stand in time coming? It is true that the nature of the question here is not quarrelling the decree on enorm lesion. It is that the sub-valuation had been derelinqushed, and more than derelinqushed. Dereliction and prescription are two different things. A sub-valuation may be lost by dereliction, even of a few years, but that is not prescription. It may be also lost by prescription, though, by merely lying by, it will not be lost by the negative prescription. The bottom of the matter is, that in that case the minister has acquired right to the over-payments, not under the valuation, but by the positive prescription. This is not a question of dereliction, but the objection is, that the sub-valuation had been lost three times over by the positive prescription, and that there had been over-payments even by the first. Here is a valuation lost and annihilated the same as if it had been rejected by the heritor; and yet, in that situation, it is brought forward, and decree of approbation passes in absence. It is said this would endanger land rights. But what happens in relations improprietations? We pronounce decreet of certification contra non products. It is only after various acts that you reduce when the writings are not produced. And even after all that, the decree may be opened up, though not as a matter of course. Now, in the present case, when a citation is given on a blank summons, and a decree is pronounced restoring a deed cut off and lost, I must adhere to the opinion I gave in the Outer-House, that it is competent to open it up. And here the objection is not, that the sub-valuation is wrong, but that it is a piece of waste paper. (His Lordship then went into the question of dereliction; but as that point was not decided, it is unnecessary to give the rest of his Lordship's opinion).

Lord Robertson.—This is a case of great importance, and my opinion has varied at different times. The heritor here has obtained a decree of approbation of the sub-valuation. This decree was regular in all respects. The summons was executed against the proper parties, and all the regular forms were observed. The minister was cited personally, but did not appear; and he now insists on setting the decree aside, and contends, that although he was personally cited, it was a decree in absence, and that he ought now to be heard on any grounds on which he could have opposed the decree. It is maintained on the other hand, that this decree is now unchallengeable. I should hesitate very long before I could find a decree in absence to have the same effect as a decree in foro. A decree in foro is held pro veritate, and nobody is allowed to chal-

‘ case of William M'Donald, Esq. of St Martin's, so far alter
 ‘ their interlocutor in this case, as to sustain the competency of
 ‘ the action of reduction; and, before answer, allow the pursuer

June 7. 1825.

large it; and for what reason? Because it proceeds on having knowledge of all circumstances; and therefore it is of consequence, after all the circumstances have been considered, that it should not be lightly opened up. Now, what is the decree here? It is entirely in absence. When the Court had no opportunity nor power to examine all the circumstances, in such a situation the pursuer takes the decree at his own risk, and I cannot agree to hold that a decree so obtained is to be held as effectual as a decree in *foro*. If the Act of Parliament puts the decrees of the Commissioners of *Taxide* on a different footing from those of other Courts, and if decrees in absence by the Commissioners are as unchallengeable as decrees in *foro*, then no doubt a reduction of a decreet of locality in absence could not be allowed; but we have an instance to the contrary in this day's roll, and no doubt was entertained of the right of reduction. But it is maintained, that there is something different in processes of approbation or valuation from other processes, and a great deal has been founded on the Act 1633. But although this Act has been founded on by the heritor, it appears to me to operate the other way, and proves that there is a right of reducing such decrees; for it is not a prohibition of review, but only a limitation of the right. It is a complaint that the lands were undervalued; and in order to remedy that, and to stop numberless litigations, there was a limitation by the Act which applies only to reduction of decrees upon the head of *enorm lesion*, which were not to be allowed but in the manner appointed by the Act; that is, when the decree is challenged on *enorm lesion*, the minister must prove that there was collusion, and that by the oath of party. But there is no prohibition against reducing the decree on other grounds, such as not calling the proper parties. There is nothing to prevent such reductions. It is better not to say any thing as to the decision till this preliminary point is settled.

Lord Sessath.—I own I have formed an opposite opinion. It is unnecessary, in my view of the question, to go to the point of dereliction, because I think that it is not competent to open up this decreet of approbation, which is bottomed on a process regularly brought, and all parties called, though they did not appear. At first, a report of a sub-valuation was made to the High Commission at once without any process, and it was approved of. Afterwards a more regular mode of proceeding was adopted by a summons of approbation, and that seems to have been adopted prior to the Act 1633. It seems not to have been held as necessary that the defenders should appear in valuations, if they had been regularly called, of which a variety of instances are given on the eighth page of Mr M'Donald's memorial. Then as to approbations of the proceedings of the sub-commissioners, a variety of instances are given on page tenth of that memorial, to shew that it was not necessary that the defenders should appear. Then as to the Act 1633, on which this question mainly depends, the terms of it are, ‘ *Attour for clearing all doubts and difficulties which may arise anent the rectifying of valuations, or other particular heads following, his Majesty and Estates have declared and declare, that where valuations are lawfully led against all parties having interest, and allowed by the former commissioners according to the order observed by them.*’ (This appears to relate to the proceedings of the sub-commissioners from the words themselves, and from the context, and therefore this statute was meant to apply, not only to the High Commission, but to the sub-commissioners, and that is a material point in the discussion). The statute then goes on, ‘ *That the same shall not be drawn in question or rectified upon pretence of enorm lesion at the instance of the minister not being titular, or at the instance of his Majesty's Advocate, for and in*

June 7. 1825. ' to give in a condescendence of his grounds of reduction, founded on the objections to the sub-valuation, and the dereliction thereof by over-payments: quoad ultra refuse the desire of the

' respect of his Majesty's annuity, except it be proved that collusion was used betwixt the titular and heritor, or betwixt the procurator-fiscal and the titular and heritors, which collusion is declared to be where the valuation is led with diminution of the third of the just rent presently paid, and which diminution shall be proved by the party's oath.'

Some of your Lordships have gone on the latter part of the statute as if it applied only to the case of enorm lesion. Now there are two different things here. These decrees are not to be drawn into question,—that is one thing; nor to be rectified for enorm lesion,—that is another thing. From the last part of the clause it is plain, that if collusion can be alleged, it is competent to open up the sub-valuation or approbation, and it is sufficient collusion where the enorm lesion is one-third. But unless upon the question of collusion, if the valuation has been led against the proper parties, and approved of, it is not to be opened up at all.

It is said that this Act does not apply to the case in hand, of there not being an appearance for the minister, though regularly cited. I am at a loss how to construe the statute, unless it applies to this case. The enactment would have been useless if it only applied to cases where all parties had not only been cited, but appeared; therefore I don't see the use of it unless it was to go the length of the case in hand, where every thing was regular, so far as citing them, though they did not appear. In point of expediency there is great room for the construction put on the Act by Mr M'Donald, because no heritor has it in his power to compel parties to appear, and it would be hard if the situation of his teinds were to depend on their making appearance at any time within the forty years. I admit, that if it could be made out that the parties were not cited, that would do, because that would not fall under the statute; as it is only where the valuations are lawfully led against all parties having interest, which means that all parties are called having interest. In the same way, if there are any intrinsic nullities in the procedure, the Act would not apply, and that appears to me to be the real ground of the opinion given by Connell, (vol. i. p. 438. quoted in the case before us to-day of the Duke of Gordon). ' According to the practice of the present Court, it is not considered to be essential that the defenders cited should enter appearance. If the proceedings have been correct and formal, a decree of valuation, as well as a decree of approbation in absence, will be attended with all the effects which usually attach to a decree in foro of the Court of Session.'

Therefore, upon the whole, though it is a nice question, and though it is with hesitation, still I am of opinion that it is not competent for this pursuer to open up this decree of approbation.

Lord President.—I am in the same situation with Lord Robertson, as my opinion has varied at different times. I was for some time of the same opinion with him, and if I viewed this decree as a judicial procedure merely, I would continue of that opinion; but a process of valuation is not, strictly speaking, a judicial proceeding. It is a privilege given to me to get my property valued on going through certain forms. It is not from any obligation come under to me, or any obligation by me. I am not asking any thing out of the pockets of the persons called, I am only seeking to acquire certain privileges, which is to depend on my going through certain forms, one of which is, that I shall cite those having interest. The Legislature might have adopted any other mode, but this is what they have prescribed. Accordingly I take all these steps; and I call the summons at the head burgh, and stick it up on the church door, or I call the

'petition.' To this judgment their Lordships (3d December 1825. June 7. 1825. 1823) adhered.*

* Shaw's Taind Cases, Nos. 20. and 23.

minister and the titular,—I go through all the forms, and then the valuation is lawfully made. It is something like another statutory privilege—that conferred upon proprietors of entailed estates as to improvements. It is not precisely the same, but it is very analogous; provided I do certain things I am entitled to make the expense of the improvements a burden on the entailed estate. I must call the heir of entail next after those of my own body, or his nearest male relation. If I have done all this, and called the next heir, though the decree should pass in absence, the heir would not be allowed to challenge the expediency of the improvements. The analogy of judicial procedure does not hold in such a case. Judicial procedure goes on a supposed quasi contract; and if this quasi contract is entered into before the judicial procedure, I say the law does authorize you to bring the defender oborto collo. But if there is no quasi contract, and he does not appear, he acquires a right to open up the decree. But then it is not a privilege I am acquiring to myself,—I am asking decree against another; but in the present case I acquire a Parliamentary privilege if I go through the order of law. If the parties do not appear, the presumption is, that their interests have been taken care of, and I have secured my privilege. It would be most dangerous to land rights to hold any other doctrine. I once thought there was no more danger than in opening up adjudications, which often pass in absence. If I purchase an adjudication, it is always sub periculo of being opened up. But then an adjudication is a judicial act. The adjudger asks for my money, or takes my land; and I have not only to appear for my interest, but my property is at stake. The decree here is not a judicial act. It is res voluntarie jurisdictionis; but where I have done every thing the law requires, it cannot be challenged; and this still leaves open the question as to the law of prescription in favour of the minister.

Lord Justice-Clerk.—I am afraid I must also differ from Lord Robertson; and I have come to the same conclusion with your Lordship. It is quite clear that it is on the Act 1633 that the question depends; and in confirmation of what your Lordship has now said, it is material to attend to the words of another clause of the statute: 'And his Majestie, with consent of the estates foresaid, finds, declares, and ordaines the acts, decreets, and ordinances of the commissioners foresaid, and of the other persons who shall be surrogate in their places by his Majestie in manner aforesaid, in the whole particulars above specified, and every one of them, to have the strength, force, and authority of a decret, sentence, and Act of Parliament.' Therefore the proceedings under this Act, when duly followed out, are to have the force of an Act of Parliament. It therefore places them on a different footing from common judicial proceedings. Now, when you consider the object of the Act, for clearing all doubts and difficulties that may arise, it comes to be a very narrow ground to say, that the only ground was confined to cases of enorm lesion alone. There is a great deal in considering what was the object of the Legislature. It is material in reference to the construction contended for, that the only ground is collusion, and a definition of collusion is given. The declaration of the Legislature is, that without any further proof than the diminution of one-third, they can bring it under review. It is material to see what occurs in Connell as evidence of the course of practice, (446.) 'In reference, no doubt, to this clause in the Act of Parliament, in an approbation of a sub-valuation of lands in the parish of Linlithgow,' the King's Advocate appeared, and protested, 'that he might have action to rectify the valuation, in case the samen were one-third within the worthe; and the commissioners approved of the sub-valuation, the minister

June 7. 1825. The Duke of Gordon appealed, and Mr Gillan, the minister, cross appealed, in so far as his objections to the form of the decree had been repelled.

'agreeing, and the heritor not objecting, "but prejudice to his Majesty's Advocate for his Highness's interest to rectify the valuation above-specified, in case the same be one-third within the just worth and vail thereof. 1st July 1686." A similar qualification was annexed to another decree of approbation pronounced on the same day respecting other lands in the same parish.' Here is complete evidence as to the practice, within three years of the Act, that those interested, who had doubts as to the sub-valuation, had a qualification introduced, that they should be at liberty to challenge it. That is a strong argument, that unless collusion could be shown, the decree could not be reduced.

Lord Bannatyne.—I rather agree with the Lord Ordinary, that the decree may be challenged.

Lord Balgray.—I never could see the distinction between an ordinary valuation and a decree of approbation. In the first, the minister cannot open it up. The proceedings of the sub-commissioners were nothing more than taking a proof, as in other cases, to be reported to the High Commission. I have always looked on a decree of approbation as a *modus acquirendi dominii*; it is the legal title to the subject.

State of the Votes.

For Altering.—Lords Hermand, Succoth, President, Justice-Clerk, Balgray, Belmont, Pitmilny, Meadowbank.

For Adhering.—Lords Cringletie, Robertson, Bannatyne, Craigie.

At the advising on the 21st May 1823, the following Opinions were delivered:—

Lord Balgray.—A difficult and important case. Interlocutor imports, that the proceedings in the valuation are the same as in a civil process, and that the same rules must be observed as to decrees in absence. Have great doubts of this: no distinction between decreets of valuation of, and decreets of approbation. I take it for granted, that proceedings had been lawfully conducted, and that omnia rite et solemniter acta. Interlocutor adverse to the views and intention of the Legislature, and will be attended with serious consequences to land-holders. The intention of valuations was, that there should be permanent establishments to clergy, to stop drawing tithes, and to crush the power of the lords of erection, viz. titulars and their tacksmen,—not a mere civil process. The measures of Charles I. produced great discontent. The machinery of proceedings quite adverse to the idea of a civil process. Intrusted Procurator-fiscal and King's Advocates, and rules laid down for proceedings in absence of the parties, and cannot be said that the proceedings must be voided if in absence. See First Minutes of Commissioners in Treatise on Tithes, p. 49. No doubt, a remedy of rectification—Act 1633—where there was enorm lesion, but no right to challenge valuations, even if fraudulent, if no lesion to this extent. In Act 1690, c. 30., the clause is more clearly expressed. Said meaning of word lawful is, that a decree must be liable to no legal exception; No. 38. App. Terms used shews 'lawful means,' if valuations led against all having interest. If no legal objection, the decree protects itself. Plea adverse to the right intended to be created; for the purpose of valuation, as it is somewhere expressed, was to create an heritable right. Consider the consequences in a ranking and sale, a proof of holding land and burdens, including tithes. Now, what is the proof of the tithes? Is it not the decree of the Court? Cases of warrandice, cases of entail, where clear rental is found, or in making provisions to the children, &c. As to the practice of the Court not moved. Both Judges and lawyers ignorant of the law till Sir John Connel's Treatise on Tithes was published; and question never fully brought before the Court till now. Would be very wrong to lay

Appellant (in Original Appeal.) The decree of approbation cannot be regarded as pronounced in absence, and therefore cannot now be opened up. But even if in absence, decrees, in matters of this kind, stand in a very different situation from decrees in mere civil suits. This is evident from the instructions of Charles I. and the subsequent statutes. Indeed, it is by statute expressly declared, 'that the acts, decreets, and sentences of the Commission, shall have the strength, force, and authority of a decret, sentence, and Act of Parliament.' No doubt, if

June 7. 1825.

held of the forms of the Courts in common law to defeat the great system of valuation of tithes. The rule would be even against the clergy; for all parties have coexistent interest in tithes. Said, as challenge of valuations were formerly competent, must be so now. Parallel cases in civil form. Decree of expiry of legal questions about entails. Every party bound to give effect to the object of valuation, and not to lie by, and then object to decrees.

Hermand.—A very nice case; agreed formerly with Lord Balgray, but after full consideration, I am of a different opinion. Here his Lordship repeated the arguments for the minister, and cases here quoted.

Lord Justice-Clerk.—Undoubtedly a nice case, and have had different views, but still for interlocutor last pronounced. No doubt this is a case differing from that of a civil nature; and if we were to consider ourselves as acting under the authority of Parliament, this would relieve us from a great deal of trouble; but innumerable cases of reductions. But not so by Act 1633: by that Act, all matters of teinds, augmentations, and valuations, are put in *pari casu*;—always a power to rectify valuations. The clause in the Act merely provides for a case of enorm lesion, and leaves every other case untouched; refers to cases quoted.

Robertson.—Formerly gave a full opinion. Plea is the sub-valuation departed from for fifteen years, and decree of approbation pronounced in absence, whole in ignorance of the fact. In an approbation there is no proof led. Argument, on the other side, does not rest on law, but on the Act 1633. But this clause only applies to cases of collusion, and there are innumerable cases of reduction.

Lord President.—A very difficult case, but for adhering to last interlocutor. Had I been sitting as a Commissioner before the Union, would have rather gone into the other opinion. In original valuations, absolutely necessary to proceed in absence. Act 1707 does not say we were to be Commissioners, but to proceed as in other civil causes, and Court cannot act in the capacity of Commissioners, because, if it did, could not grant secure augmentations. As to our decrees having the force of an Act of Parliament, do the Court not, in many cases, prorogate tacks of teinds, disjoin and annex lands? and our decrees, in these instances, are subject to review: or suppose a forged valuation, or one completely void, had been approved of in absence, could it possibly be maintained that such decree was not subject to review?

Gillies.—Still against interlocutor. Words of 1633 clear. If they do not apply to this case, they can apply to none. Every proceeding declared to have the force of an Act of Parliament.

Craigie.—Even decrees of Parliament may be reduced on nullities.

Adheres.—Lords President, Justice-Clerk, Bannatyne, Craigie, Cringletie, Hermand, Robertson, Mackenzie.

Alter.—Lords Balgray, Allevay, Gillies, Pitmilley, Meadowbank.

Lord Glenlee did not vote. Lord Succoth, absent.

June 7. 1825. there has been lesion to the extent of one-third of the just rent, the valuation may 'be drawn in question,' but that was the only ground; and the rule plainly follows, that mere absence cannot ground a challenge.

The practical results which would arise from the opposite doctrine, would be most injurious. Besides, the decree, even if reduced, would not benefit the respondent, as the sub-valuation was lawfully led, and is exposed to no just grounds of challenge.

(*In Cross Appeal.*)—As to the minor pleas of the respondent, it is quite clear that the Earl of Fife, as the undivested feudal proprietor, had a sufficient title to pursue; and that the respondent, although not inducted at the time, yet, his presentation having been sustained, he was properly called as a defender.

(*Respondent (Original Appeal.)*)—The decree of approbation was clearly a decree in absence; but it is well known, that the actual appearance of a defender is necessary to secure the decrees of civil courts from challenge; and there is no ground for a distinction (either arising from their nature, or from statutory interference) in cases of teind. This is not the time or place to go into the question as to the invalidity of the sub-valuation—the objection of want of parties—or dereliction, or any other. The inquiry at present is merely, whether the decree of approbation can be reduced to admit the discussion of these objections; and all the authorities shew that a reduction, on ground of absence, is well founded. By statute a power is given to rectify (under a certain restriction) valuations, generally including decrees of approbation; and such a power being conferred on the Commissioners, they were entitled to review their own decrees, or to open up the judgments where the defender had not appeared; and the like power is open to the present Commissioners.

(*In Cross Appeal.*)—Besides, the respondent has to object, 1st, That, when the summons of approbation was executed, the Duke of Gordon was the true proprietor; and that he neither concurred as a pursuer, nor was called as a defender. 2d, That it was directed against a wrong party: when executed, the parish of Speymouth was vacant; the respondent was not inducted; and, therefore, the Moderator of the Presbytery ought to have been called, and not the respondent.

The House of Lords ordered and adjudged, 'that the original 'and cross appeals be dismissed, and the interlocutors, so far as 'complained of, affirmed.'

LORD GIFFORD.—My Lords, There is a case which stands for your Lordships' judgment, in which the Duke of Gordon is appellant, and

the Rev. James Gillan respondent; and there is also a cross appeal between the same parties. June 7. 1825.

The principal point in the case respected the validity of a decree of approbation, by the Lords of Council and Session, as Commissioners for Plantation of Kirks and the Valuation of Teinds; and the question raised was, whether that decree, being a decree in absence, as it is termed, could be opened on the part of Mr Gillan, on the grounds of objection which he had to that decree? It was contended, on the part of the Duke of Gordon, that though pronounced in absence, it was to be considered a decree absolutely binding upon the parties, and that Mr Gillan could not open that decree. My Lords, in this case, as well as in others, this subject has undergone very grave consideration in the Court below, and there has been a considerable difference of opinion on that question. After discussion in this case, the Judges were of opinion, that it was competent to Mr Gillan to open that decree, and a very elaborate judgment was pronounced by some of the Judges.

Since the appeal was heard, I have had an opportunity of reading the judgment which was pronounced in the case of Dunbar (minister of Kinnoul) against Macdonald, in which the same question arose, in a manuscript report of it, which is much more full than the printed report of it to which your Lordships were referred.

My Lords,—I have, as it was my duty, considered the judgment which has been pronounced by the Court below in the case, and the result of my opinion is, that the judgment of the majority of the Judges in the Court was well founded. It is, therefore, my intention to move your Lordships, that that interlocutor shall be affirmed; and that being my intention, it is unnecessary for me to do that which I should have done under other circumstances—state the reasons which have influenced my judgment. It is sufficient to say, that I am satisfied with the reasons which have been urged by the majority of the Judges in the Court below.

My Lords,—Mr Gillan has also appealed, complaining that, by the interlocutor which has been pronounced, he has been precluded from urging certain formal objections, which he says existed to the process of approbation, such as want of parties to that proceeding. I have also considered that part of the case. The Judges in the Court below were unanimous on that part of the case against the objections urged by Mr Gillan. That certainly is no reason why your Lordships should be called upon to affirm that judgment, if there are reasons for reversing it. It is the bounden duty of those who assist your Lordships in these matters to consider, whether or not the reasons, which influenced the learned Judges in coming to that decision, were well founded; and though this House is undoubtedly inclined to pay all that deference which is due to the opinion of those learned persons, it is, at the same time, the duty of this House to consider,—and especially of those who advise your Lordships,—to consider whether the opinion which was

June 7. 1825. thus formed was founded on right principles. My Lords, having given my best attention to this matter, I see no reason whatever, in this case, to find fault with those reasons which influenced the Court below to repel those objections on the part of Mr Gillan; and, therefore, on the cross appeal also, I should humbly move your Lordships that the judgment be affirmed;—that the interlocutors appealed shall be affirmed, and both appeals dismissed.

Appellant's Authorities.—(*In chief Appeal.*) Stat. 1633, c. 19; 1690, c. 30; 3 Connell, 107.; 1. id. 433.—(*Cross Appeal.*) 1. Con. 335. et seq.; Cochran, June 26. 1751, (9951.); Lanark, July 29. 1772, (9954.); House of Lords, March 2. 1782.

Respondent's Authorities.—(*In chief Appeal.*) Stat. 1633, c. 19.; 1707, c. 9.; Kin-noul, May 21. 1823, (Shaw's Teind Cases, No. 20.)—(*Cross Appeal.*) 2 Ent. 6. 51.; Johnston, March 3. 1810, (F. C.); Campbell, March 2. 1808, (Ap. & Removing); 2 Ersk. 10. 25.; 2. id. 5. 20.; Thompson, Nov. 17. 1611, (3335); Campbell, Feb. 26. 1741, (14,795.); College of Aberdeen, Jan. 10. 1672, (14,791.); Forbes's Treatise on Tithes, p. 401.; Magistrates of Kirkcubright, Feb. 12. 1777, (15,765. & Ap. No. 1. Teinda.)

SPOTTISWOODE and ROBERTSON—CONNELL,—Solicitors.

No. 33.

MAJOR MACKAY, Appellant.

ERIC LORD REAY, Respondent.

Prescription.—A fee-simple proprietor having, in 1733, executed an entail of his estate to his son, and the heirs of the son's marriage, and other substitutes, reserving power, with consent of his son, to alter, except as to the heirs of the marriage, on which infertment was not taken; and having, in 1741, with his son's consent, executed a disposition of the estate, without fetters, on which sasine was taken; and having cancelled the entail; and one of the heirs of the marriage having afterwards, by a decree of proving the tenor, revived the entail, on which infertment was taken in 1768; and the heirs of the marriage having become extinct in 1797; and a party who was entitled to succeed, both under the entail and the unfettered disposition, having in ignorance of the latter made up titles under the entail, and there having been a possession for a period exceeding forty years from the date of the infertment in 1768;—Held, (affirming the judgment of the Court of Session), That, having two titles, he was entitled to impute his possession to the unfettered disposition, and that the entail was not rendered effectual against the estate by prescription.

June 7. 1825.
1st DIVISION.
Lord Alloway.

In the earlier part of the last century, George Lord Reay held the estate of Reay in fee-simple, under a charter from John Earl of Sutherland. He had three sons, Donald, Master of Reay, Hugh, and George. In August 1732, in contemplation of the marriage of his son Donald, Master of Reay, with Marion Dalrymple, a contract of marriage was executed, by which Lord

June 7. 1696.

Reay granted procuratory for resigning all and sundry the lands, mills, &c. therein specified, 'in favours and for new charters and 'infestments of the same, to be made, given, and granted to the 'said George Lord Reay, in liferent, during all the days of his 'lifetime, and to the said Donald, Master of Reay, his eldest 'lawful son, in fee, and to the heirs-male to be procreated betwixt him and the said Mrs Marion Dalrymple, his future 'spouse; which failing, to the heirs-male to be procreate of the 'said Donald, Master of Reay, his body, of any subsequent marriage; which failing, to Mr Hugh Mackay, second son of the 'said George Lord Reay, and the heirs-male of his body; which 'failing, to Mr George Mackay, third lawful son of the said 'George Lord Reay, and the heirs-male of his body; which failing, another male substitution; 'which failing, to the said George 'Lord Reay, his nearest heirs-male whatsoever; which failing, 'to the said Lord Reay, his nearest heirs and assignees whatsoever, the eldest heir-female and descendants of his body including all the other heirs-portioners, and succeeding without 'division, through the whole course of succession, in all time to 'come, after all the heirs-male shall happen to fail.'

This deed was fortified by the usual clauses of a strict entail, and bore a variety of provisions, all directed against Donald the Master, and 'the heirs-male of his body, and the other heirs of 'taille and substitutes before-mentioned;' and it was declared, that 'the said Donald, Master of Reay, and the heirs-male of his 'body, and the other heirs and substitutes aforesaid, shall enjoy, 'brue, and possess the said estate, by virtue of the present contract and infestment to follow hereupon, and by no other right 'or title whatsoever;' but Lord Reay reserved power to burden the lands with provisions to a certain extent to the younger children of the marriage, and power to him and his son, the Master, 'during their joint lifetimes, in their liege poastie, and 'with mutual consent, to alter the course of succession and taille 'above-mentioned, except in so far as concerns the provisions to 'the said Mrs Marion Dalrymple, and the heirs and daughters 'of this marriage.'

Donald had two sons, also named George and Hugh.

In 1741, while the contract remained personal and unrecorded, Lord Reay, with consent of his son and the Dalrymple family, cancelled the marriage-contract; and, 'for certain good 'causes and considerations moving' him thereto, executed a disposition of the estate in favour of Donald, Master of Reay, in liferent, and George Mackay, eldest son of his marriage with Ma-

June 7. 1825.

rion Dalrymple, Mistress of Reay, and the heirs-male of his body, in fee; which failing, to Hugh Mackay, second son of Donald, and the heirs-male of his body; which failing, the heir-male thereafter to be procreated of the body of Donald; which failing, the male substitution called in the marriage-contract of 1792; but, after his own nearest heir-male whatever, calling 'the nearest heir-female of the last heir-male, according to the above destination, who was last in possession of the lands, baronies, and others.' This disposition did not contain the fetters of an entail. Of the same date, Lord Reay and the Master conveyed the rents of the estates to certain trustees, for the payment of debt and other purposes; and a few days afterwards, on the narrative of the reserved power in the marriage-contract to alter, and that it was meet and convenient, for their mutual advantage, and the advantage of their family, to alter the deed of 1782, they executed a deed of consent and ratification, declaring their consent 'to the alteration of the destination of succession in the foresaid contract, in so far as the same is innovate or altered in any respect' by the disposition; and 'declare, that the foresaid disposition was granted with mutual consent of us both, in virtue of the reserved powers above mentioned.'

Lord Reay died in 1748, and was succeeded by his son Donald, (now Lord Reay), who in 1750 took infeftment to himself, in liferent, on the disposition 1741; and, in 1760, to his son George, (now Master of Reay), in fee, and the sasines were recorded.

In 1757 his son George married Miss Marion Mackay, and on that occasion, with consent of his father, executed marriage articles, by which he disposed in fee-simple the estate of Reay to himself and the heirs-male of the marriage, on whose failure, to a series of substitutes, one of whom was George, the third son of George Lord Reay, (called by the contract of 1732), and the heirs-male of his body. Infeftment followed and was recorded. In 1761 George entered into a second marriage with a Miss Fairlie, and executed a similar deed.

Donald died in 1761, and was succeeded by his son George, who soon afterwards, for the purpose of defeating the trust-conveyance of the rents, revived, by an action of proving the tenor, the contract and entail of 1792. He recorded the decree in the Record of Taillies, and in 1768 expedite a general service as heir-male and of provision to Donald, his father, under the contract of marriage and entail of 1792. He died in the same year, and

having no issue was succeeded by his brother Hugh, who being June 7. 1825. cognosed as a lunatic, his tutors and curators, in August of that year, exped a general service in his favour as heir-male and of provision of his brother George under the marriage-contract 1732, and infeftment followed. This was the first assine which had been taken on the marriage-contract 1732. Of this infeftment and relative titles, and inter alia the marriage-contract 1732, a charter of confirmation was obtained from the superior in 1778. Hugh died in 1797 without issue, and thus the heirs of the marriage between Donald and Marion Dalrymple became extinct.

The succession, both to the honours and the lands, now opened to Eric, eldest son of George Mackay, third son of George Lord Reay, the entail. He made up titles by clare constat as heir of entail to his cousin-german Hugh, the lunatic,—was infeft on the precept,—recorded the infeftment,—and on these titles possessed for a number of years. He then raised an action of declarator against Major Mackay and the other heirs of entail, alleging that he had been in ignorance of the deed 1741, which had removed the fetters from all the substitutes called in the entail 1732, excepting the heir of the marriage, (now extinct); and concluding that it should be found and declared, that he was entitled, without making up any new titles, to hold the estate of Reay in fee-simple; or that, by making up titles to Donald, or his son George, as standing last feudally invested in the estate in fee-simple, he would hold the estate in fee-simple, and be entitled to exercise without challenge all the rights of an unlimited proprietor. Major Mackay stated in defence, that the pursuer, not having connected himself with the deed of 1741, had no interest or title to insist in the action; that even if he had, the contract of marriage was an effectual deed of entail, and the titles made up on it by the pursuer and his predecessors formed the sole subsisting investiture of the estate; that the deed of 1741 was not effectual, and the infeftments following on it were inept, and had been repudiated by George the son of Donald, who restored the marriage-contract, and served himself heir in general to his father; and that the investiture under the entail had endured for upwards of forty years, and thus secured the estate to the heirs of entail called by the marriage-contract. The Lord Ordinary found, '1mo, That 'the pursuer has a sufficient interest and title to insist in this 'action, in order to ascertain the precise situation in which he 'stands with regard to this estate: 2do, Finds, that by the contract of marriage 1732, entered into betwixt Donald, Master of

June 7. 1823. ' 1792, as well as under the deed 1741, and the contracts of marriage in 1757 and 1761, his making up his titles under the one deed did not exclude him from making up his titles under the other deeds, if he thought fit; and that having all these titles in his person by the repeated decisions of this Court, he cannot be barred, either by the positive or negative prescription, from founding upon them: Finds, therefore, that as the pursuer is not an heir of the marriage with Marion Dalrymple, he is not prevented from making up his titles under the deed 1741, or any of the other deeds to which he has right; and repels the defences, and decerns in terms of the second alternative conclusion of the libel.' To this judgment the Court, on the 25th November 1823, adhered.*

Major Mackay appealed.

Appellant. (Title.)—The respondent has qualified neither title nor interest. He has not connected himself with the deed of 1741; and this is not a declarator merely for the purpose of ascertaining the effect of his own titles, but to have it found that, in respect of the deed 1741, he is entitled to hold in fee-simple.

(Merits.)—An effectual entail was created by the marriage-contract 1732; and by it George, the first Lord Reay, and Donald, Master of Reay, were unquestionably bound. No doubt that entail contained a clause reserving power to alter the order of succession, (so far as the heirs and daughters of the marriage were not concerned), not, however, to abrogate the conditions of the entail. If the latter had been intended, the clause would have been very differently expressed. This construction is made evident, from the motives actuating parties inserting such clauses, from the terms of the deed itself, and from the meaning given to such clauses in other entails: Particularly it is manifest, from the substitution in favour of heirs-female of the marriage. It is undeniable that the heirs of the marriage could not be disappointed; yet the reading contended for by the respondent has the effect of defeating their claims, which never could have entered into the contemplation of the entailer. The answer, that the last substitute called before the heirs-male would hold the estate in fee-simple, and therefore the destination to the heirs-female is not protected by the taillie, is not sound; for

* See 2, Shaw and Dunlop, No. 509.

June 7. 1885.

that destination is distinctly protected by the entail; and the destination in favour of the preceding heirs is necessarily burdened with the destination in favour of the heirs-female. But if the deed 1741,—which followed, as if in execution of the reserved faculty,—was not sanctioned by the clause of reservation, then it must be inefficacious, and the sasines following thereon be inept. This is evident, from the construction of the deed itself; and all doubt is removed, when it is recollected, that the respondent admits that no deed altering the order of succession could operate, while the heirs of the marriage were existing. The deed 1741 was therefore ultra vires of the maker, and must fall, as having resulted from an excess of power; and this vitiation must prove fatal in toto; for the deed, looking to its construction, cannot be sustained in part, and be held void in part. Indeed, the party who executed the deed had no power to do so; for by the entail he was merely a liferenter. The appellant's interests are protected in another view: The decree of proving the tenor bore, that the taillie was a sufficient and valid right, title, and security to, &c., and to the other heirs-substitutes by the contract of marriage; and on this title the estate has been held for more than forty years, and thus the positive prescription established, securing an unchallengeable right of succession to the substitutes called by the contract of marriage.

Respondent. (Title.)—The respondent has clearly both title and interest to sue; at all events, he has now made up titles in fee-simple under the deed 1741.

(Merits.)—The entail 1732 never having been feudalized, the reserved power could be exercised by the simple execution of the deed 1741. George first Lord Reay had been, previous to 1732, feudally vested in the estate, and had, therefore, unquestionably power to grant the deed of 1741, and to authorize in-fertment to be taken on it. The heirs of the marriage certainly were protected from any change of succession; and accordingly they succeeded to, and took up the estate, as long as they existed. In 1797 they failed, and then the succession opened to the respondent, who clearly had a right to hold either by the entail or by the deed 1741; and he chuses the latter. The deed of 1741 was intra vires of the maker, and authorized by the clause of reservation. It was not intended to affect the heirs of the marriage; and accordingly, the marriage-contract 1732 was restored by the decree of proving the tenor. If there were any irregularity in any of the heirs of the marriage making up their titles under the deed 1741, that could have been corrected by reduc-

June 7. 1825. tion; which not having been resorted to, the deed 1741 was left among the investitures of the estate to take effect the moment the heirs of the marriage failed. This did not occur until 1797; and it is quite plain that, until then, prescription could not begin to run. As to the other pleas of the appellant, it is only the heirs-male of the marriage that have any onerous claim, or *jus crediti*, under the contract. The heirs-female are not called in their capacity as such at all, and would have been excluded by the last substitute, who would have held in fee-simple. And as to the extent of the power reserved, it is obvious that the meaning contended for by the appellants is unauthorized; for the order of succession could be changed, (excepting as to the heirs of the marriage); and if a new succession altogether had been called, what less would that have amounted to, than a total abrogation of the entail, in reference to the other substitutes not heirs of the marriage? Besides, in grammatical construction, the power relates both to succession and feters. The respondent made up his titles in ignorance of the deed 1741. He had that title as well as the title under the entail 1732. He can still betake himself to the former; and as he had two titles, he is protected from the effect of positive prescription.

The House of Lords ordered and adjudged, ‘that the appeal be dismissed, and the interlocutors complained of affirmed.’

Appellant's Authorities.—Roxburghe case, June 23. 1807, (13. Ap. voce Taillie); Heirs of Campbell, June 17. 1746, (15,505.); Sinclair, Nov. 8. 1749, (15,382.); Bruce, Jan. 15. 1799, (15,539.); Porterfield, May 15. 1821, (1. Shaw & Bal. No. 6.: remitted for reconsideration, 2. Wilson and Shaw's Appeal Cases, No. 29.); Smith, June 30. 1752, (10,803.); Durham, Nov. 24. 1802, (11,220.); Welsh Maxwell, June 21. 1808, (F. C.); Lumsden, June 13. 1811, (F. C.); Buchanan's Trust-Assignee, March 4. 1813, (F. C.)

Respondent's Authorities.—Porterfield, May 15. 1821, (1. Shaw & Bal. No. 6.: remitted for reconsideration, 2. Wilson and Shaw's Appeal Cases, No. 30.); 3. Ersk. 8. 32.; Lealie, Dec. 15. 1710, (15,358.); Earl of March, Feb. 27. 1760, (15,412.); 2. Ersk. 1. 30.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

ÆNEAS SMYTH, Appellant.

No. 34.

CLEMENTINA and MARY OGILVIES, Respondents.

Cautioner—Septennial Prescription—Stat. 1695, c. 5.—A creditor, holding a bond from two individuals, both bound as principal co-obligants, although one was known to be merely cautioner, having accepted a composition, and discharged the principal, reserving recourse against the cautioner; and more than seven years having elapsed from its date;—Held, (affirming the judgment of the Court of Session), 1. That the Act 1695 did not apply; and, 2. That, as the reservation was of a qualified and conditional nature, (viz. that the discharge should not be effectual to the principal in case the cautioner should thereby be liberated), the cautioner was liable for the balance.

On the 20th of June 1796, John Innes of Leuchars, W. S. borrowed L. 1000 from the respondents, Misses Ogilvie, for which he and the appellant, Mr Smyth, granted a bond, by which they bound and obliged themselves, ‘conjunctly and severally,’ their heirs, executors, and successors whatsoever, to content, satisfy, and pay, &c. the above sum to the respondents, in common form. Smyth was merely cautioner, Innes being the principal debtor; but no clause of relief was inserted, nor any back-bond executed. The affairs of Innes becoming embarrassed in 1805, he called a meeting of his creditors, and offered a composition of 12s. 6d. per pound. The creditors assented, and bound themselves, on receipt of the composition, to discharge Innes; and a relative deed of accession repeated the obligation ‘to discharge him, his heirs, executors, and successors, or those who may have become cautioners for him, of the whole debts, principal and interest, and expenses due by him to us, or our constituents, preceding the date hereof; and we agree to supersede all manner of execution against his person or property in the mean time.’ The minute of agreement, and this relative deed, were signed by the creditors, including the Misses Ogilvie; but they added to their signatures, ‘reserving recourse against Mr Smyth, cautioner. They received payment of the composition, and, thirteen years afterwards, they demanded from Smyth payment of the balance.

Smyth refused to pay; and a charge having been given to him on the bond, he brought a suspension, in which he pleaded, 1. That, as he was truly a cautioner, and had been recognized as such in the discharge, and more than seven years had elapsed

June 7. 1823.

1st DIVISION.
Lord Gillies.

June 7. 1825. from the date of the bond, he was relieved by the statute 1695, c. 5.: And, 2. That as the principal debtor had been entirely discharged, the relative cautionary obligation had necessarily fallen. The Lord Ordinary sustained the reasons of suspension, and suspended the letters simpliciter. Thereafter, on advising a representation for Misses Ogilvie, in which they alleged that Smyth was fully aware of the reservation, his Lordship ordered them to lodge a special condescendence of the facts they aver, and offer to prove, in regard to their 'having entered into the contract with Mr Innes, and agreed 'to discharge him of the debt, upon receiving a composition 'of 12s. 6d. per pound, with the consent and knowledge 'of the suspender Mr Smyth.' A diligence for recovering writings for this purpose was afterwards granted, from which it rather appeared that Smyth had known generally the nature of the proceedings attending the settlement with Innes. The Lord Ordinary having then reported the case on informations, the Court, 'in respect the discharge of the debt in 'question, granted to Mr Innes by the chargers, appears to be 'of a qualified and conditional nature, that the same shall not 'be effectual to Mr Innes in case the cautioner shall be liberated thereby,' repelled the reasons of suspension, found the letters orderly proceeded; and afterwards (on the 22d November 1821) adhered, by refusing a petition without answers.*

Smyth appealed.

Appellant.—1. The claim in question is cut off by Act 1695, c. 5. No doubt originally the statute was held only to embrace cases where there was an express clause of relief, or an intimated bond of relief; but latterly an equitable extension has been given to the Act to situations where the creditor is aware of the true relative character of parties, although they may be both, *ex facie* of the bond, bound as principals.

2. The ratio decidendi of the judgment appealed from is contrary to the express terms of the contract; for the discharge to Innes is total and unqualified. If it were qualified, as the Court has found, the discharge could have, in regard to Innes, no meaning; for, if the cautioner were subjected, then he would have re-

* 1. Shaw and Ballantine, No. 190.; and F. C.

course against Innes; and if not subjected, then, *ex ratione decidendi*, the respondent had recourse against Innes. Besides, this very reservation should have an opposite result to the one sanctioned by the Court; for the reserved right could be exercised against Innes only if the appellant was not subjected; and yet the appellant has been found liable, on the ground that the respondent has not liberated Innes. But farther, the ground of the interlocutor only would have warranted a decree against Innes, and not against the appellant.

June 7. 1825.

3. But even if Innes was truly discharged in toto, the reservation in favour of the respondents is ineffectual. They had no right to grant the discharge without the appellant's consent and knowledge. Cautionary obligations are strictly interpreted. When any thing is done by the creditor, having a tendency to weaken the cautioner's right of relief, the cautioners are freed; much more so when he passes from the security he held against the principal obligant's person and estate. It is in vain to speak of a private reservation of recourse. Such transactions would give rise to endless frauds, and expose cautioners to the most ruinous consequences.

Respondents.—1. There being no clause of relief in the bond, and no bond of relief apart having been granted and intimated, the appellant cannot take advantage of the statute 1695, c. 5. which has not received the latitude of construction contended for.

2. There is no rule of law which prescribes to a creditor, having two parties jointly liable for his debt, which of the two so liable he shall sue; or, having sued one, shall prevent his discontinuing such suit, and recurring on the other. Whether cautioner or not, the appellant, who bound himself as principal obligant, cannot assume the character of cautioner, if that assumption prove prejudicial to the respondents.

3. The appellant has suffered no injury from the qualified discharge granted to Innes; against Innes he still has relief. It was justifiable, and indeed the course dictated by common prudence, for the respondents to reserve recourse against Innes; and the meaning of the reservation was unquestionably what the Court gave to it. The evidence shews that these proceedings were all known to the appellant, who must now fulfil the engagement which induced the respondents to part with their money.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors, so far as complained of, affirmed.'

June 7. 1825. *Appellants' Authorities*.—Paisley, Jan. 13. 1776, (8228.); University of Glasgow, Nov. 18. 1790, (2104.); 3. Ersk. 3. 66.; Wallace, Jan. 25. 1717, (3389.); 1. Bell, 275.; 2. Bell, 503.

Respondents' Authorities.—Leitch, July 10. 1680, (2077.); Whitelaw, May 20. 1814, (F. C.)

J. CHALMER—A. DUTHIE,—Solicitors.

No. 35. JEAN BROWN and her Curator ad litem, Appellants.
MARY BOGLE and Husband, Respondents.

Process.—Found, (affirming the judgment of the Court of Session), That the Court of Session have, on good cause shewn, power to recall letters of advocacy after they have been signetted.

June 8. 1825.
1st DIVISION.

JEAN BROWN, the wife of Richard Monkhouse, instituted an action of damages for defamation in the Commissary Court of Glasgow, against Mary Bogle, wife of Michael Gilfillan. The action was allowed to fall asleep without defences having been lodged. Thereafter, a new libel relative to the same defamation, and concluding for damages, was raised in the Court of Session, in which Bogle, founding on the action in the Commissary Court, pleaded *lis alibi*, and the Lord Ordinary before answer ordered condescendence and answers.

Bogle having wakened the action in the Commissary Court, and lodged defences, the Commissaries found, that she and her husband were entitled to insist that the summons of damages should either be proceeded with or abandoned, and decree of *absolvitor* obtained; therefore sustained the summons of wakening at their instance, and before answer ordained Brown to reply to special defences pleaded to the summons of damages.

Brown then presented a bill of advocacy, but she did not lay the Inferior Court process before the Lord Ordinary, or intimate the step thus taken to Bogle. His Lordship passed the bill without caution *ob contingentiam*; and the clerk indorsed the fiat *ut petitur*. Next day, the letters were expedited, and passed the signet. On that day, Bogle having learned what had happened, presented a note to the Lord Ordinary, craving time to petition the Court, but did not intimate the note to Brown. The Lord Ordinary thereon prohibited the expediting the letters of advocacy for eight *sederunt* days, that she might present a petition to the Court. By the time, however, that this deliver-

ance was communicated to Brown's agent, the letters had been expedé, and signetted. June 8. 1825.

Brown's agent having refused to agree to a recall of the letters, Bogle and her husband presented a petition to the Court, praying for a warrant to recall the letters of advocacy, and to remit the bill to the Lord Ordinary to refuse the same, with expenses; and in the mean time to prohibit the clerk from enrolling the letters of advocacy. Their Lordships (27th January 1824) appointed answers, and in the mean time prohibited enrolment; and thereafter granted warrant for recalling the letters of advocacy, and remitted to the Lord Ordinary to recall his interlocutor, to hear parties on the bill *de novo* as he should see cause; and found Brown liable in expenses.*

Brown appealed.

Appellant.—1. In carrying through her bill of advocacy, the appellant was not guilty of the slightest violation of the rules of Bill-Chamber procedure, as fixed by Acts of Parliament, Acts of Sederunt, and established practice. She had not in her power to lay the process before the Lord Ordinary, because her agent had been compelled by a caption to return it to the clerk of the Commissary Court. Intimation was not necessary in point of form, and *de facto* the respondent was quite aware of the appellant's intention to advocate.

2. The bill of advocacy having passed his Majesty's signet upon a regular warrant, it was *ultra vires* of the Court of Session to recall the expedé letters. Expedé letters were no doubt recalled in the case of *Keith v. Grinton*, but a radical nullity in the warrant was the reason. Here there exists no such objection.

Respondent.—1. The whole of this proceeding is a trick to obtain an advantage over the respondent, and deprive her of the security afforded by caution in an advocacy for the expenses of the suit. The advocacy was liable to insurmountable objections in point of form. In obtaining the bill past, the appellant kept the Lord Ordinary in ignorance of the true nature of the case, by omitting to lay the process before his Lordship; and to effect the same purpose, did not intimate the proceedings to the respondent's agent,—a precaution essential to the validity of the steps adopted. This, besides, was not a case

* 2. Shaw and Dunlop, 612.

June 8. 1825. where contingency could be introduced as a ground of advocacy,—that was a mere pretence to evade the enactment of the 50th of Geo. III. prohibiting advocations from interlocutory judgments of the Inferior Courts in Scotland.

2. The Court of Session has indisputably the power of passing and suspending bills; and, in special circumstances, also the power, on good cause shewn, of recalling letters of advocacy. No injury has been done to the appellant, as the remit is merely to hear parties *de novo*,—and if she be entitled to have her bill passed, that will be granted.

The House of Lords ordered and adjudged, ‘that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 50 costs.’

LORD GIFFORD.—My Lords, There is an appeal before your Lordships, heard a few days ago, in which Jean Brown, wife of Richard Monkhouse, is appellant, and Mrs Mary Bogle, spouse of Michael Gilfillan, and the said Michael Gilfillan for his interest, are respondents; which is an appeal against an interlocutor of the Lords of the First Division, arising under the following circumstances:—It appears that, in the month of January 1822, an action was commenced in the name of Mrs Monkhouse against the respondent Mrs Gilfillan, and against her husband for his interest, before the Commissary Court of Glasgow, which has a jurisdiction in matters of scandal, the summons being in the style of a libel for defamation. My Lords, it appears that no defences were returned, and that this action afterwards, in the language of the law of Scotland, fell asleep.

In the year 1823, another action was raised, for the same defamation, in the Court of Session. My Lords, to that action a defence was put in by the respondents, that there was this action pending in the Commissary Court, and therefore it was contended that the action before the Court of Session could not be proceeded in. My Lords, in consequence of that defence, it was thought necessary to raise what is called a *wakening* of the original case in the Commissary Court of Glasgow. My Lords, the present appellant, in order to get rid of the proceeding in that action she had raised in the Commissary Court of Glasgow, then had recourse to this proceeding under the statute of 50th Geo. III. cap. 112. sect. 36., which is in these words:—‘That bills of advocacy from the Sheriff and other inferior Judges in Scotland, against interlocutory judgments, shall be allowed only upon the following grounds:—First, Of incompetency, including defect of jurisdiction, personal objection to the Judge, and privilege of party: Secondly, Of contingency: Thirdly, Of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for partial payment; provided that, in the cases specified under this third head, leave is given by the Inferior Judge.’ And the appellant,

on the 25th of November 1823, presented to the Lord Ordinary, in the Bill-Chamber of the Court of Session, a bill of advocation of the Commissary process; that is, a bill or petition to the Court of Session, to issue letters of advocation; which is stated to be equivalent to a writ of appeal from any of the lower Courts to the Court of Session. It is stated, that this was done without any intimation to the respondents; and that, in consequence of the advocation, the Lord Ordinary passed the bill of advocation on the same day, the 25th of November 1823, no discussion having taken place—but it having been viewed as a mere step of form not to be opposed.

June 8. 1825.

I should state to your Lordships, that it is alleged to be the practice, on an application for such a bill of advocation, that the process in the Commissary Court should be produced to the Lord Ordinary, which was not done in this case, and to give notice to the other party of the application being about to be made. My Lords, no such notice of this application was given to the respondents. They, however, accidentally heard of it, and on the following day, the 26th of November, the day after the Lord Ordinary had passed the bill, they applied to the Lord Ordinary, detailing the imposition which had been practised, and craving time to petition the Court; and the Lord Ordinary, upon that occasion, pronounced an order, by which he prohibited expediting the letters of advocation for eight sederunt days, that the parties might present a petition to the Court. However, my Lords, before that order was made, they had been expeditious enough to get the letters of advocation expedited.

On that an application was made to the Court of Session by the present respondents, to grant warrant to recall the letters of advocation, and, on considering the bill, to remit it to the Lord Ordinary to refuse the same with full costs, and in the mean time to prohibit the clerk from enrolling the letters of advocation. On that matter coming before the Lords of the First Division, in which Division the other matter was depending, the Lords pronounced this interlocutor on the 6th of December 1823: 'The Lords having heard this petition, they appoint the same to be seen and answered, the answers to be boxed by the box-day in the ensuing recess, under an amand of L. 10 sterling; and in the mean time prohibit the enrolling the letters of advocation as craved in the amended prayer of the petition.' Afterwards, on the 27th of January 1824, they pronounced the following interlocutor: 'The Lords having resumed consideration of, and advised the petition and answers, grant warrant for recalling the letters of advocation.'

Your Lordships perceive, therefore, by this interlocutor, the Court of Session were of opinion that the letters of advocation had been improperly granted, and therefore they granted a warrant for recalling the letters of advocation, 'and remit to the Lord Ordinary to recall his interlocutor, and hear the parties on the bill de novo, as he shall see cause; find the respondent liable in expenses hereto incurred, allow an account thereof to be lodged, and remit to the auditor to tax the

June 8. 1825. 'same.' So that the effect of this interlocutor was, that it should go back to the Lord Ordinary, for the parties to be heard whether that ought to have been granted or not.

My Lords,—Against this interlocutor there is an appeal, and the ground of this appeal is, that those letters of advocacy ought to have passed; and it is urged (not very strongly) at the Bar, that the Court of Session had no power to recall those letters of advocacy after they had been expedite. However, my Lords, upon this subject a decision was cited, of *Keith v. Grinton*, in the year 1804, where, though the circumstances are different from the present, this proposition is established, that it was competent to the Court of Session to recall such letters of advocacy. Consistently with that decision, (and no decision to the contrary being cited), the Court of Session had the power in this case to recall the letters of advocacy. The Lord Ordinary himself, by the order which he pronounced on the 26th of November 1823, the very day after he had passed the bill of advocacy, prohibited the expediting the letters of advocacy for eight sederunt days, that the parties might have an opportunity of presenting a petition to the Court; clearly shewing, therefore, that in his judgment he had been induced to pass the bill of advocacy too hastily, and that he was desirous it should be brought before the Court. It is true that order came too late, because the letters of advocacy were expedite before it was given. The Court of Session were of opinion, that these parties had in this case taken the Lord Ordinary by surprise; and it is clear they did not produce, before the Lord Ordinary, those proceedings which it appears, according to the general practice, should be produced;—they stated that they were not in their possession at that time; but there is no reason whatever why the usual practice should not be followed.

Another point has been made, whether there should not be previous intimation; and on that there appears to have been a difference amongst the learned Judges: though the majority of them seem to be of opinion previous intimation was not necessary, most of them seem to think intimation was usual. But there is another point which appears not to have been before the Lord Ordinary, whether there was that contingency of justice in this case which warranted the Lord Ordinary to grant these letters of advocacy? It is stated, that this was precisely the same defamation for which the action had been brought in the Commissary Court, and that the plaintiff had recourse to this contrivance:—that the party wishing to withdraw the cause from the Commissary Court, instituted this action in the Court of Session, and saying, I call upon you to withdraw the action from the Commissary Court, where the action was first commenced,—I call upon you to advocate the cause from that Court to the Court of Session, on account of this action pending in the Court of Session in the same matter. That question appears to deserve very great consideration; and it appears not to have been presented to the Lord Ordinary when he passed the bill.

My Lords,—The question here is, Whether the Court of Session had

the power which they appear to have exercised, and whether they have exercised a sound discretion by making this interlocutor; by which they have in fact done no prejudice to the appellant; for they have merely directed the cause to go back to the Lord Ordinary, to be discussed before him, not pronouncing on the merits of the case, but giving to the Lord Ordinary an opportunity of considering that, which he shews by his interlocutor of the 26th of November ought to be further considered, whether the grounds stated in the Court of Session were not sufficient to satisfy them in pronouncing the interlocutors they have pronounced. It appears to me that they, having the power, (which I think, from the reasons I have stated, they had), sufficient grounds existed in this case for their pronouncing this interlocutor, and for remitting the matter to the consideration of the very learned Ordinary. Under these circumstances, it does appear to me your Lordships ought to affirm this interlocutor; and I cannot help thinking this is, under the circumstances of the case, a very unnecessary appeal. No injustice is done to this appellant, and there is no ground for her questioning the regularity of this proceeding. And thinking there is no ground for questioning the regularity of these proceedings—and seeing, as I do, no injustice to the appellant in what was done, even if it had been irregular,—though undoubtedly, if she had any thing to complain of, she had a right to come before your Lordships to complain of that irregularity,—I must move your Lordships to affirm this interlocutor, with L. 50 costs.

June 8. 1825.

Authority quoted.—*Keth v. Griston*, July 11. 1804, (12,021.)

J. BUTT—J. RICHARDSON,—Solicitors.

J. T. and A. DOUGLAS and Company, Appellants.

No. 36.

JAMES GLASSFORD, Esq. Respondent.

Entail—Implied Revocation.—A party having entailed an estate to himself 'in liferent, 'and to Henry, my eldest son now in life, in fee, and the heirs-male of his body,' whom failing, a series of substitutes, under prohibitory, irritant, and resolutive clauses, by the two letter of which he declared, that 'in case the said Henry, or any 'of the heirs of tailie,' shall do so and so, and particularly contract debt, 'then, 'and in every such case, not only shall all and every one of such acts and deeds be 'null and void, but also each and every heir or person contravening shall forfeit;' and having reserved a power to alter, and a few days thereafter executed a trust-deed in favour of Henry and others for payment of debts, so as to relieve the entailed estate, and granted power to them to borrow money, so as to carry on certain mercantile concerns in which he was engaged;—Held, (affirming the judgment of the Court of Session), 1. That Henry was included under the resolutive clause; and, 2. That the trust-deed did not revoke the prohibition in the entail against contracting debt.

June 10. 1825.

1st Division.
Lord Alloway.

THE late John Glassford, merchant in Glasgow, who was partner in several extensive mercantile concerns, acquired the estate of Dougalston by purchase, and other landed properties in Scotland of considerable value. He was married, and had several children; and being desirous to entail the estate of Dougalston, and to set aside his other subjects for payment of his debts, and provisions to his children, he executed a deed of entail on the 6th of August 1783, and, on the 15th, a trust-disposition and deed of settlement. By the entail, he disposed the estate of Dougalston 'to myself in liferent, and to Henry Glassford, my eldest son now in life, in fee, and the heirs-male of his body; whom failing, to my other heirs of taillie and provision after named and described, in the order of substitution underwritten.' After a clause of substitution, by which he conveyed the estate 'to myself in liferent, and to the said Henry Glassford, my son, in fee, and the heirs-male of his body, whom failing, to James Glassford, his second son,' and then to his daughters, he introduced the following prohibitory, irritant, and resolute clauses:—'That it shall not be lawful to, nor in the power of the said Henry Glassford, or any of the heirs of taillie and provision substituted to him, as before-written, to alter, innovate, or change, or to do or grant any act or deed, which may have any effect, directly or indirectly, to alter, innovate, or change this present taillie, and the order of succession hereby established or to be established, by any nomination or other writ relative hereunto, which I may hereafter make and execute, or any part thereof; nor to sell, wadset, or dispoise the said lands and others, or any part or portion thereof; nor to grant rights of annuity or annualrent payable forth of the said lands and others, or any security upon the same, or any part thereof, redeemable or irredeemable; nor to contract debts,' &c. 'And provided also, as it is hereby expressly provided and declared, that in case the said Henry Glassford, or any of the heirs of taillie and provision substituted to him as before-written, shall fail or neglect to observe and fulfil any one or more of the conditions before specified, or shall do or act contrary to, or contravene any one or more of the limitations and prohibitions before-written, then, and in every such case, not only shall all and every one of such acts and deeds, with all that shall happen or be competent to follow thereupon, or upon the failure or neglect to observe and fulfil any of the foresaid conditions or provisions, be, as they hereby are declared to be, funditus void and null, and of no force,

‘ strength, or effect whatever, in the same manner as if no such June 10. 1825.
 ‘ failure or neglect had ever happened, and as if no such acts or
 ‘ deeds had ever been done or granted; but also, each and every heir
 ‘ or person so contravening, or acting contrary to the said limita-
 ‘ tions and prohibitions, or any of them, or failing or neglecting
 ‘ to fulfil the said conditions and provisions, or any of them,
 ‘ shall, for him or herself alone, immediately on such contraven-
 ‘ tion, failure, or neglect, forfeit, amit, and lose all right and title
 ‘ which he or she previously had, or has, or can claim or pretend
 ‘ to the said lands and others, or any part thereof, and the same
 ‘ shall eo ipso and immediately devolve upon and belong to the
 ‘ next heir of tailie existing at the time who shall prosecute and
 ‘ declare such irritancy, albeit descended of the failzier or con-
 ‘ travenor’s own body.’

The irritant and resolute clauses thus ran into each other, the latter commencing at the words, ‘ then, and in every such case.’ In almost all the other clauses, Henry Glassford was introduced nominatim, the words being, ‘ that the said Henry Glassford, and ‘ the whole other heirs of tailie and provision,’ shall be obliged to do so and so. In the conclusion of the deed, Mr Glassford reserved to himself ‘ full power and liberty, at any time in my ‘ life, and even on deathbed, to cancel, revoke, burden, qualify, ‘ explain, or in any respect to alter, innovate, or change these ‘ presents, or any part thereof, at my pleasure.’

The trust-deed proceeded, inter alia, on the narrative, ‘ that I did, on the 6th of ‘ August 1783, execute a deed of tailie, settling ‘ my lands and estate of Dougalston, and others therein mentioned, ‘ on the said Henry Glassford, my son, and other heirs of tailie ‘ and provision substituted to him;’ and therefore he disposed in favour of his son Henry, and certain other persons in trust, his whole other estates, heritable and moveable, but that ‘ under the ‘ exception of the said lands and estate of Dougalston, and others ‘ specifically described in the deed of tailie.’ Among other subjects conveyed to them, were ‘ his shares and concerns in trades and ‘ manufactures,’ with the exception of those in two companies, which he on the same day assigned to his son Henry. Power was given to the trustees to name factors ‘ to ingather, collect, ‘ recover, and turn into cash; the moveable and personal estates ‘ and subjects herein disposed;’ and they were appointed thence to pay his whole debts, ‘ so as to relieve my taillied lands and ‘ estate, and other subjects specially destinated, thereof;’ and to make payment to his other children of certain provisions ‘ at and ‘ against the expiration of one year, or two years at farthest,

June 10. 1825. 'after my decease:' recommending to his children to postpone, if necessary, insisting for payment of the principal sum of their said provision 'till the expiration of one or two years after my 'decease, in order my said trustees may have time to recover the 'same from the said trust-funds.' 'And, lastly, my said dispo-
'nees upon trust shall be bound and obliged to account for, and
'convey the residue and remainder of the premises and proceeds
'thereof, to and in favour of the said Henry Glassford my son; and
'failing him, to and in favour of the heir of tailie having right
'at the time to my lands and estate of Dougalston and others
'contained in the said deed of tailie.' Then followed this
clause, of which the part included within parentheses was written
on the margin:—'And for the better enabling the said trust-
'disponees to execute this trust, I hereby specially empower
'them, or their quorum, (if they judge it expedient, and to pre-
'vent loss by the premature winding up of any concerns wherein
'I am interested, and where the shares of deceasing partners do
'not fall to be paid out according to the preceding balance, to
'concur with the other partners in continuing the said concerns,
'and borrowing money or other measures necessary for that pur-
'pose, until the said concerns be properly winded up for the
'behoof of all concerned). 'And further, I hereby specially em-
'power them, or their quorum, to compromise or submit to
'arbitration all disputed claims,' &c. He then declared, that
the provisions thereby made, and the conveyance by the deed
of entail, should be in full satisfaction to his children of all claims
against him, legal or conventional.*

On the 27th of August of the same year (1783) Mr Glassford died; at which time his son Henry was in minority. The entail was recorded on the 15th November thereafter, under which titles were made up in favour of Henry; and the trustees accepted and entered into the possession and management of the trust estate. They found it expedient to continue several of the concerns in which Mr Glassford had been engaged, and to borrow money for that purpose, for which they granted their personal obligations. In 1790 they executed a commission and factory in favour of Henry, for the management of the trust estate; and accordingly he thenceforth took the whole charge of it. He embarked as a private individual in extensive mercantile specu-

* It was stated by the respondent, that both the deed of entail and the trust-disposition were revised by Sir Hay Campbell, Mr Rolland, and Mr Blair, who were then at the Bar.

lations, entirely unconnected with the trust estate, which, it was not disputed, was quite sufficient to pay all the claims against it. In the course of his business as a merchant, he became indebted to the appellants, Douglas and Company, merchants in Glasgow, in, L. 14,083. 18s. 7d., for which he granted bills, and in 1819 he died insolvent. He was succeeded by his only brother, Mr James Glassford, who made up titles to the estate of Dougalston, in virtue of the entail, cum beneficio inventarii. Thereafter the appellants brought an action before the Court of Session against the respondent, in which, after setting forth that ' Henry Glassford, Esq. of Dougalston, now deceased, was justly addebted, resting and owing to the pursuers, ' the principal sum of L. 14,083. 18s. 7d.' conform to bills on which they libelled, that he stood heritably infest, at the time of his death, in the estate of Dougalston, to which the respondent had made up titles, they concluded, that ' therefore the said ' James Glassford, as heir served and retoured to the said ' Henry Glassford, or as otherwise representing his said brother on one or other of the passive titles known in law, ' ought and should be decerned and ordained, by decree and ' sentence of the Lords of our Council and Session, to make payment to the pursuers of the aforesaid principal sum, &c.; at ' least it ought and should be found and declared, by decree and ' sentence in manner foresaid, that the lands and others before ' described, wherein the said Henry Glassford stood infest and ' seized at the period of his death, were affectable by the diligence of the law for payment of his just and lawful debts; and ' it being so found and declared, the said pursuers ought to have ' decreet and sentence of our said Lords against the said James ' Glassford, defender, secundum vires inventarii, to the effect ' that they may have process of adjudication and others of the ' law competent directed and led at their instance against the ' said lands and estate before described, and others, in which the ' said Henry Glassford died infest, or which belonged to him, for ' payment and satisfaction to them of the aforesaid principal ' sums and interest thereof, as aforesaid.' To this action the respondent gave in these defences:—' The late Mr Henry ' Glassford took and held the estate of Dougalston only under a ' strict entail, with clauses prohibitory, irritant, and resolute, ' particularly applicable to the contraction of debt. The defender succeeded and made up titles to the said estate, under ' the said entail only, and is not in any other way the heir, nor ' in any way the representative, of Mr Henry Glassford. Neither

June 10. 1825.

June 10. 1825.

' the estate of Dougalston nor the defender, therefore, is liable for the debts of Mr Henry Glassford. Wherefore the present action is groundless; and the defender ought to be 'assoilzied with expenses.' Lord Alloway ordered the appellants to give in a general condescendence of the grounds of their action; on advising which, with memorials, he reported the case upon informations. On the part of the appellants these propositions were maintained:—1st, That the entail was ineffectual to protect the estate against Henry Glassford's debts, because the resolute clause was directed against 'each and every heir or person,' which could not include him, seeing that he was the institute. 2d, That although there was a prohibition in the entail against contracting debt, yet this had been recalled by the power conferred on the trustees, of which Henry Glassford was one, to borrow money and contract debt. And, 3d, That the debts in question arose out of, and were traceable to the trading companies in which the entailer, Mr Glassford, had been concerned, and which his trustees were authorized to continue, and therefore must be regarded as entailer's debts, for which the estate was attachable.—On the other hand, the respondent contended, 1st, That the resolute clause was effectually directed against Henry Glassford. 2d, That so far from the trust-deed being intended as a revocation of the entail, it was made for the very purpose of supporting and giving effect to it. And, 3d, That although the allegation that the debts sued for were entailer's debts was relevant, yet it was not competent under the present summons, in which they were stated to be the private debts of Henry Glassford, and in point of fact this statement was not true. The Court, on the 22d January 1825, 'sustained the defences, assoilzied the defender from the whole conclusions of the libel, and decerned, but found no expenses due;' and to this judgment they adhered, on advising a petition, with answers, on the 14th November thereafter.*

Douglas and Company appealed.

Appellants.—I. It is settled law, that it is essential, to protect an estate against creditors or purchasers, that the entail must contain a prohibitory clause, an irritant clause, and a resolute

* 2. Shaw and Dunlop, No. 476. and Fac. Coll. where the opinions of the Judges will be found.

June 10. 1825.

clause; all and each of them directed in express words, both against the particular acts intended to be prohibited, and against the *fiar* in possession. It is also settled law, that entails are *strictissimi juris*, and that no defect or omission can be supplied by implication. Accordingly it was decided, in the case of *Duntreath*, and several previous ones, that although the fetters were directed against the heirs of *taillie*, yet they could not be applied to the institute or disponent; and, on the same principle, it was found in the case of *Steel*, that the words, 'the whole heirs and members of *taillie*,' did not embrace the institute. Now, in the present case, it is plain, that although *Henry Glassford* was undoubtedly the institute, yet he was regarded by the entailer as forming one of the class of the heirs of entail. Accordingly, with very few exceptions, all the clauses refer 'to the said *Henry Glassford*, and the whole *other* heirs of *taillie*.' No doubt the words of the prohibitory and irritant clauses are sufficiently applied to him, but they have just the effect to shew the more strongly that the resolute is not so. In the former the words are, 'the said *Henry Glassford*, or any of the heirs of *taillie* and provision substituted to him;' but in the resolute clause the declaration is, that 'each and every heir or person so contravening,' &c. shall forfeit, without any mention of *Henry Glassford*. These words, however, have plainly a collective signification, being applicable not to one heir only, but to many heirs, and not to one person, but to many persons. As the words 'every heir' comprehends a multitude, so must of necessity the word *every person*; because the entail does not speak of any other multitude, except the multitude of heirs. It is evident, therefore, that the word 'person' is here used as synonymous with heir, and consequently the case is brought directly under the authority of that of *Steel*, where the expression was 'heirs and members of *taillie*.' It follows, therefore, that as *Henry Glassford* was the institute, the resolute clause has not been effectually directed against him; and if so, there can be no doubt the estate is attachable for his debt.

II. But, in the second place, the prohibition against contracting debt was recalled by the terms of the trust-deed. It may be true, that the trust was originally executed with the intention of protecting the entailed estate; but that evidently proceeded on the supposition, that it would not be necessary to carry on the mercantile speculations. Accordingly, the provision for doing so, and the power granted to contract debt, was plainly the result of after consideration, as is demonstrated from the circumstance

June 10. 1825. of the whole clause being inserted on the margin and not in the body of the deed. By this power, therefore, Mr Glassford substituted the trustees in his place as a partner of these companies, whereby his whole estate and funds became responsible for the consequences. But if so, then it is manifest that he could not consistently keep up the prohibition against Douglaston being liable to be attached for debts, because it of necessity was equally as much responsible for them as any of his other estates. That such could not be his intention was further established by the fact, that he appointed the institute one of his trustees, and consequently vested him with the power of contracting debt.

III. The appellants are ready to establish in the proper mode, that their debts arose out of the trust so constituted by the entailor, although no doubt the obligations for payment of them were granted by Henry Glassford *privato nomine*. There is nothing in the objection to the form of the summons, because the declaratory conclusions are sufficiently broad to admit the question of the liability of the estate for the debts due to the appellants.

Respondent.—I. It is admitted by the appellants, that the prohibitory and irritant clauses are sufficiently directed against Henry Glassford, but it is said that the resolute is not so. Now the irritant and resolute clauses form one continuous and unbroken sentence. Thus the irritant clause commences with providing, 'as it is hereby expressly provided and declared, that 'in case the said Henry Glassford, or any of the heirs of tailie,' shall do so and so, 'then, and in every such case, not only shall 'all and every one of such acts and deeds' be void and null, 'but also each and every heir, or person so contravening,' shall forfeit, &c. There cannot, therefore, be the least doubt that this clause was intended to apply to Henry Glassford, and that in point of fact it did apply to him. The whole of the appellants' argument rests on the unfounded proposition, that a conveyancer is not entitled to make use of pronouns, or general or relative terms, and that, by omitting to do so, and not repeating proper names over and over again, he must of necessity make an ineffectual deed. Throughout the whole of the entail Henry Glassford is placed in contradistinction to the heirs, so that the term 'person' must of necessity have been intended to apply to him, and to no other. The case of Steel was of a most special nature. In the first place, there was no antecedent to which the phrase 'heirs and members' could be applied, except the term 'heirs and substitutes' mentioned in the previous

clauses, which did not include the institute. In the second place, June 10. 1886. the institute was, in an immediately preceding clause, named in contradistinction to the 'heirs and members,' so that it was impossible to include him under these words. But in the present case Henry Glassford is the only antecedent to which the relative word 'person' can be with any propriety applied; and there is not, as in the case of Steel, any incongruity in doing so. Accordingly, in the case of *Syme v. Dickson*, a judgment was pronounced supporting an entail, where the terms were much more doubtful than in the present, and therefore is a strong authority in favour of the respondent.

II. There is no foundation whatever for the appellants' plea on the trust-deed. It rests entirely on the gratuitous assumption, that the clause on the margin was the result of after consideration, and that the practical effect of it was to destroy the entail, for supporting which the trust-deed was executed. The entailor had no such intention, as is demonstrated by the nature and terms of the trust-deed. It is true that Henry Glassford was named a trustee, and that debts were contracted on account of the trust; but all these debts have been paid, and those in question were contracted with Henry Glassford as a private individual.

III. As the action is founded on bills granted by Henry Glassford; and the summons bears that they were due by him alone, it is incompetent to insist for a decree of constitution as against John Glassford. But in point of fact the debts are not due by him, and it was only at a late stage of the cause that the respondents made this assertion.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed.'

Lord Gifford.—My Lords, There is a case appointed for your Lordships' judgment, in which Messrs John, Thomas, Archibald, and Colin Douglas, are appellants, and James Glassford, Esq. is the respondent. The question in this case, as discussed at your Lordships' Bar, is, whether the appellants, Messrs Douglas, are entitled to attach the estate of Dougalston, of which the respondent stands seized, for certain large debts constituted in their favour by bills or promissory-notes granted by the late Mr Henry Glassford, the immediate predecessor of the respondent? The defence to this action is, that the estate of Dougalston was entailed by Mr John Glassford, the father of Mr Henry Glassford, in such a manner as to prevent its being affected by the debts of Mr Henry Glassford, and to render it strictly an estate of inheritance. The answers to this defence are two:—first, That ad-

June 10. 1825. mitting that the entail in question was in its form sufficient to restrain Mr Henry Glassford from affecting it by debts, yet the effect of that entail was varied by a trust-deed executed by Mr Glassford two days after that deed of entail; and, secondly, That supposing the appellants failed in making out that part of the case, the entail itself was defective so far as it related to Mr Henry Glassford, and therefore they had a right to claim the debts as encumbrances which affected that estate.

My Lords,—It appears that Mr John Glassford engaged in very large commercial transactions in Scotland, and that shortly before his death, being anxious to settle this estate upon his family, and also to make a general arrangement respecting his affairs, he, on the 6th of August 1783, executed the entail in question of the lands of Dougalston. By that entail he disposed this estate to himself in liferent; then to Henry Glassford, his eldest son, and the heirs-male of his body, in tail; to his other heirs of tailie and provision after named and described, in the order of substitution underwritten. My Lords, that entail was guarded, fenced, as it is termed in the law of Scotland, by two clauses necessary in constituting a good entail, namely, irritant and resoldtive clauses, with reference to which it will be necessary to state what has occurred upon the subject, and also to state to your Lordships more particularly what the language of those clauses is. It is sufficient in this branch of the case to say, that there was a clause prohibiting Mr Henry Glassford, and the other heirs of tailie, from altering, changing, making, or doing any act or deed which may have any effect, directly or indirectly, to alter, innovate, or change the present tailie; and from selling, wadsetting, or disposing the lands, or any part or portion thereof; and from granting rights of annuity, or yearly rent, payable forth of the lands and others, or any security upon the same, or any part thereof, redeemable; and from contracting debts.

My Lords,—This entail, as I have stated to your Lordships, was executed on the 6th of August 1783; and in the same month, four or five days only having elapsed from the execution of that instrument, Mr Glassford executed another deed, called in these proceedings a trust-deed of settlement. By that deed he recited that he had, on the 6th day of August 1783, executed a deed of tailie, settling his lands and estate of Dougalston, and others therein mentioned, on the said Henry Glassford, his son, and other heirs of tailie and provision substituted to him. He then went on to state, that ‘therefore, and for his love and favour to his other children, and for other good causes him thereunto moving, he has disposed, as he hereby does, and with and under the exceptions, burdens, and reservations therein after specified, gives, grants, disposes, and conveys from him, after his decease, to and in favour of the said Henry Glassford, his son, and to several other merchants and traders, and Thomas Graham and Archibald Graham, writers, as trustees and fiduciaries, upon the trust, for the ends, uses, and purposes therein after-written, declaring the major number of them accepting and in life, from time to

June 10. 1825.

‘time, to be a quorum, all and sundry his lands, and other heritable
 ‘and real estates,’ and so on; ‘with powers for each trustee, at and im-
 ‘mediately after his decease, to enter on the premises, and to levy,
 ‘receive, recover, and possess themselves of all and every part of the
 ‘premises, and to do every thing in the same manner, and as effectually,
 ‘to all intents and purposes, as he could do if in life.’ Then he went
 on to declare, that that deed was granted ‘with and under the excep-
 ‘tions, burdens, conditions, and reservations, and for the ends, uses,
 ‘and purposes herein after specified, namely, that there shall be
 ‘excepted, as I hereby except from these general dispositions and
 ‘conveyances, the said lands and estate of Dougalston, and others
 ‘specially described in the said taillie, and all other lands and heri-
 ‘tages and subjects, heritable and moveable, real and personal, which
 ‘have been and shall be particularly destinated and disposed by me
 ‘to any other persons or series of heirs; and that the uses, purposes,
 ‘and intent of my granting these presents, are in order that my said
 ‘disponees in trust, or their quorum aforesaid, may and shall have
 ‘right, in consequence of the herein before-written dispositions, as I
 ‘hereby specially empower and authorize them, to ingather, collect,
 ‘receive, recover, and turn into cash the moveable and personal estates
 ‘and subjects herein disposed.’ And then he went on to declare the
 trusts upon which this property was vested in those trustees. They
 were, ‘in the first place, in payment and performance of all my just
 ‘and lawful debts and engagements any way prestable and incumbent
 ‘upon me at the time of my decease, so as to relieve my taillied lands
 ‘and estates, and other subjects specially destinated, thereof; and
 ‘which debts my said trustees may pay without putting the claimant
 ‘to the trouble and charges of any formal constitution, unless, if they
 ‘think proper, they may exact the summary affidavits of all or any of
 ‘the claimants of open accounts, without prejudice to the trustees in-
 ‘sisting for full legal constitutions in any cases where they judge it
 ‘expedient; and also in payment of my funeral expenses, and the
 ‘expenses they may disburse in the management of the said trust
 ‘funds, which they shall be entitled to retain and be paid out of the
 ‘same, as such expense shall be ascertained by the account of the
 ‘disbursers.’ Then, in the second place, in payment of certain pro-
 visions which he makes for his other children. And then he says,
 lastly, ‘The disponees in trust shall be bound and obliged to account
 ‘for and convey the residue and remainder of the premises, and pro-
 ‘ceeds thereof, to and in favour of the said Henry Glassford, his son,
 ‘and failing him, to and in favour of the heir of taillie having right at
 ‘the time to his lands and estate of Dougalston, and others, contained
 ‘in the said deed of entail.’

Then, my Lords, there is a clause, which has been much comment-
 ed upon in the discussion of this case. ‘And for the better enabling
 ‘the said trust-disponees to execute this trust, I hereby specially em-
 ‘power them, or their quorum, if they judge it expedient, and to pre-

JUNE 10. 1825. 'vent loss by the premature winding up of any concerns wherein I am
'interested, and where the shares of deceased partners do not fall to
'be paid out according to the preceding balance, to concur with the
'other partners in continuing the said concerns, or borrowing money,
'or other measures necessary for that purpose, until the said concerns
'be properly winded up for the behoof of all concerned. And far-
'ther, I hereby specially empower the said trustees, or their quorum,
'to compromise or submit to arbitration all disputed claims, both for
'and against my estate, and even to compound or take part for the
'whole of any debts owing, or claims competent to me, that may
'prove bad or doubtful, and also to name one of their own number,
'or any other proper persons, to be cashiers and factors for them on
'the premises, and to allow such factors a reasonable gratification for
'trouble; and I request the said dispositive upon trust to accept the
'said office, and for their encouragement declare, that they shall not
'be liable for omissions, nor obliged to do any other diligence than to
'them shall seem proper.'

My Lords,—A very few days after the execution of these two in-
struments Mr Glassford died, leaving his son, Mr Henry Glassford, at
that time in minority. His concerns were carried on by the trustees;
and in the month of January 1790, Mr Henry Glassford having at
that time attained twenty-one, and executed a deed of factory, as it is
called, by which those trustees, on the narrative that they had 'settled
'the accounts of James Gordon and Henry Riddell, the former com-
'missioners, at Whitsunday 1788, and that the said Henry Glassford,
'who is heir and residuary successor of his father, did, at or soon after
'that term, with our consent, enter upon the management of the re-
'maining trust funds as commissioner for us; and the said former com-
'missioners did then pay over to him the balance of cash in their
'hands; all conformable to the said sederunt-book, and to the journal
'and ledger kept for the said trust-estate, and abstract made there-
'from, which are all severally docqueted and signed by us, and the
'discharge and ratification granted by the said Henry Glassford and
'the said trustees to the said commissioner, to which books and writ-
'ings reference is hereby had. But whereas a commission in habile
'form to the said Henry Glassford, in place of the former commis-
'sion, hath not been hitherto executed, which it is requisite should
'be done; therefore the said trustees, in virtue of the powers com-
'mitted to them in the said trust-deed, nominate, constitute, and ap-
'point the said Henry Glassford to be commissioner for us in the
'management of the said trust-estate, and for fulfilling the purposes
'of the trust; hereby committing to him, and vesting him with full
'power, warrant, and commission, to collect, buy, receive, and turn
'into cash the remaining moveable and personal subjects conveyed to
'us by the said disposition, and the rents and proceeds of the remain-
'ing heritages, and to grant receipts, discharges, and all other writ-
'ings necessary in the premises,—to pay off the debts that may still be

owing from the said estate, and the provisions to his brothers and sisters, in so far as still owing, and in the mean time, till the principal provisions be paid, to pay the interest thereof; and in general to manage, negotiate, and transact our whole ordinary affairs and business as trustees foresaid, as freely and effectually as we ourselves could do in our proper person; declaring, that our said commissioner shall be obliged, from time to time, as required by us, to make just count and reckoning and payment to us, or a quorum of the said trustees, for and of his intromissions in consequence of these presents, deducting his disbursements and expenses.' June 10. 1825.

My Lords,—In consequence of this, Mr Henry Glassford took upon himself the sole management of those concerns. He, in the course of the conduct of those concerns, contracted a very large debt to the present appellants, the pursuers in this action. It appears that Mr Henry Glassford, at the time of his death, was indebted to these appellants in the large sum of L. 14,083. 18s. 7d.

Upon the death of Mr Henry Glassford, the appellants, finding that, independently of the entailed estate, his funds were wholly inadequate to the payment of his debts, instituted this action against the present possessor of this entailed estate, Mr James Glassford; and the summons proceeds upon the narrative,—‘ That Henry Glassford, Esq. of Dougalston, now deceased, was justly addebted, resting and owing to the pursuers, the principal sum of L. 14,083. 18s. 7d. sterling, with interest, as after specified; which principal sum is composed of the sums of money following, viz. the sum of L. 1500 sterling, contained in and due by a promissory-note granted by the said Henry Glassford to the pursuers, dated the 20th of November 1818, and payable six months after date;’ and then the summons recites the various bills of exchange and notes given by Mr Henry Glassford for the amount of this debt. The summons then goes on to state, that at the period of his death, which happened about the 19th of May 1819, he stood heritably infeft and seized in all and sundry the lands and estate of Dougalston; that subsequent to the death of Mr Henry Glassford, Mr James Glassford, the present respondent, his brother, had made titles to him as heir of entail to the said lands, and entered into possession and possessed the same, and that they had required of him the payment of those debts; that he had refused to pay the debts libelled, although often desired and required, and that therefore they sought to have him ordained, by the Lords of Council and Session, to make payment to the pursuers of the sum in question.

The defences which were put in to this action for Mr Glassford were,—‘ That the late Mr Henry Glassford took and held the estate of Dougalston only under a strict entail, with clauses prohibitory, irritant, and resolute, particularly applicable to the contraction of debt. The defender succeeded and made up titles to the said estate under the said entail only, and is not in any other way the heir, nor in any way the representative, of Mr Henry Glassford.

June 10. 1823. 'Neither the estate of Dougalston, nor the defender, therefore, is liable for the debts of Mr Henry Glassford.'

My Lords,—This case coming on before the Lord Ordinary, he ordered a condescendence and answers, in order to bring out the precise state of the averments of the parties in point of fact. His Lordship afterwards ordered memorials on the whole case; and on advising these, thinking the questions to be of importance, and attended with difficulty, he reported the case to the Court, and ordered informations, without himself pronouncing any judgment.

The case thereupon came on before the First Division of the Court of Session, who, on the 23d of January 1823, pronounced this interlocutor:—'Upon report of the Lord President, in absence of Lord Alloway, and having advised the mutual informations given in for the parties in this case, the Lords sustain the defences, assolvize the defender from the whole conclusions of the libel, and decern; but find no expenses due.'

The case was again brought before the Court of Session for their further consideration; and, on the 14th of November 1823, they pronounced another interlocutor, by which they adhered to the interlocutor reclaimed against, and refused the desire of the petition. From these the present appeal is brought to your Lordships.

My Lords,—The first question which has been argued at your Lordships' Bar is this:—Admitting, for the sake of this branch of the argument, that the entail itself was complete, and that Mr Henry Glassford was bound by it,—still it is contended, that under the effect and operation of that trust-deed executed by Mr Glassford, the author of the entail, that trust-deed had the effect of altering or revoking the entail to this extent, that inasmuch as it authorized the trustees, and empowered them to continue the mercantile concerns, and to contract debts, and inasmuch as Mr Glassford himself did not entail this estate to free it from debts contracted by himself, the effect and operation of this trust-deed was, that the debts contracted by Mr Henry Glassford, in his character of trustee under that deed, must be considered as affecting the entailed estate, and therefore were to be considered as debts recoverable against the estate in the hands of other persons.

My Lords,—In order to understand and to apply this argument, it is extremely important for your Lordships to attend to the form of this trust-deed. As I have stated in this branch of the argument, it is admitted that the entail may be considered as a complete entail, if it stood alone, so as to prevent the estate being affected by debts; but to discover whether the result is varied by the circumstance of Mr Glassford having executed this general trust-deed and disposition, it is necessary to refer to its provisions. He recites in that trust-deed, that he had entailed this estate of Dougalston on Mr Henry Glassford, and the other heirs of tailie and provision substituted to him; and he excepts from the general dispositions and conveyances the lands and estate of Dougalston and others, specially described in the deed of

June 10. 1825.

taille. One main object, as it should seem, for this trust was, his being anxious to settle that estate on his family, and to free it from the debts then existing; and in order to effect that, it appears that the great object of this trust-deed was, that those parties realizing the property vested in them by this instrument should, in the first place, pay all his debts and obligations from the estates and funds so conveyed in trust to them: that it was not his intention to impair the deed of taille, but to relieve his estate at Dougalston by providing for the discharge of every debt which could affect it out of other funds. Then, after payment of those debts, he makes a provision for his children, and if the effects vested in the trustees should be more than sufficient to answer all the purposes of the payment of debts, he directs that the residue and remainder shall be conveyed in favour of Mr Henry Glassford, his son, and, failing him, to and in favour of the heir of taille having right at the time to his lands and estate of Dougalston and others contained in the deed of taille. Your Lordships see, therefore, that he has very anxiously excepted from the operation of this trust-deed, as far as he could by law, the estate of Dougalston; he not only anxiously excepted the estate itself from the operation of the trust-deed, but his object has been to free it, as far as he could, by means of immediately subjecting his other property for debts then existing.

My Lords,—Mr Glassford having been engaged, as it is stated in these papers, in eleven or twelve very large concerns, he foresaw there might be a difficulty, and that it might be attended with a loss to his family, if those concerns were prematurely and hastily wound up after his death; he therefore, by a special clause, authorized the trustees, if they judged it expedient, and where the shares of deceasing partners did not fall to be paid out according to the preceding balance, to concur with the other partners in continuing said concerns, and borrowing money, or taking other measures necessary for that purpose, until the said concerns should be properly wound up for the behoof of all concerned. By virtue of that power it appears that those concerns were, as I have stated to your Lordships, continued by Mr Henry Glassford, who was the person first entitled under this deed to the estate of Dougalston. In the management of that concern we may assume, therefore, that debts were contracted. Now it is said, that those debts being contracted by Mr Henry Glassford, it must be taken not only in equity and justice, but according to the fair construction of this instrument, that Mr Glassford, the author of the entail, must have intended his whole property should be liable to those debts. My Lords, as far as the creditors of this gentleman were concerned, it appears to me that it is impossible they could (taking pains to inquire into the state of this property) have been at all induced to give credit to Mr Henry Glassford in consequence of this property, because, as I have already stated to your Lordships, that estate of Dougalston was most anxiously excluded and

June 10. 1825.

excepted from the operation of this trust-deed; and, as I have already stated, the effect of this argument, if it could prevail, of affixing these debts on the estate of Dougalston, would be in direct contradiction and in direct opposition to that which was the intention of Mr John Glassford, the entailer, clearly expressed in the deed; because not only is that property excepted, which would of itself be sufficient without more to prevent the estates being affected by those debts, supposing they were not the debts of Mr John Glassford, to prevent its being affected by any debts contracted by the trustee, Mr Henry Glassford; but, as I have stated to your Lordships, the very object of this trust-deed is, that the person possessing that estate shall have the benefit, as far as he could give it him, of some other property, by paying out of that other property the debts which were at that time a burden on the estate of Dougalston. I have stated to your Lordships, that this was intended to be the effect of this deed so far as it related to those debts. Your Lordships, in this cause, have nothing to do with the debts of Mr John Glassford the entailer. If the present pursuers can make out, in any other proceeding, that the debts which they are now seeking to recover against this estate of Dougalston were or ought to be considered as the debts of Mr John Glassford, it is admitted on all hands, and it cannot be disputed, that Mr John Glassford could not except this estate from the payment of his own debts; and therefore, if that question could be raised, the effect of your Lordships' judgment, if it shall be to confirm the judgment of the Court below, would not at all prevent the pursuers, or any other persons who have clear demands against Mr John Glassford the entailer, from enforcing those demands if they could make out that proposition.

My Lords,—It has been contended, very ingeniously and very forcibly in this case, that the effect and operation of this trust-deed was to do away the effect of the previous entail, in as far as it respected any debts of Mr Henry Glassford; and that, therefore, the effect of that entail could not be set up in opposition to the trust-deed; that under that trust-deed it was competent to these trustees, in the management of those concerns, which were the concerns of Mr John Glassford the entailer, to contract debts; and that if, in the course of that concern, they contracted debts under the liberty given them in the powers I have already stated to your Lordships, the entailed estate of Dougalston was subject to those debts. But, my Lords, I must confess at the time the argument proceeded at your Lordships' Bar, and on the farther consideration of the case, no doubt has ever been infused into my mind upon the effect of this trust-deed. Upon that branch of the case, the opinion of the Court of Session appears to me to be the only opinion which could be given upon that deed.

My Lords,—That being so, we then come to another extremely important question in this case, not only as it affects this case,

June 10. 1825.

but as it affects the law of Scotland upon the effect and operation of the entail. My Lords, there are some principles applicable to this subject which are familiar to us, which have been stated at your Lordships' Bar, and which cannot be disputed. Entails, by the law of Scotland, are, in the language of the writers on the law, *strictissimi juris*. It has therefore been held, that the parties taking under an entail are not to be restricted by any implication, but that the restraint imposed upon them must be clear and express; and that the three clauses, which are called prohibitory, irritant, and resolute clauses, must be all concurrent and co-extensive, in order to have the effect of securing the entail, which it is intended shall be imposed upon the institute and the heirs of entail; and therefore, my Lords, if the prohibitory clause prohibits the contracting of debts, but the other clauses, though intended to be co-extensive, shall omit any of those forms, it is a feature in the law of Scotland, that the heir of entail will not be bound, except in so far as those three clauses are co-extensive.

My Lords,—Another rule has been established, and I agree with the Counsel for the appellants, that after the case of Duntreath, and those other cases, whatever doubts your Lordships may have entertained on the propriety of those decisions originally, yet it is our bounden duty, in cases which come before us on this branch of the law, to take care, as far as we can, that no infringement be made on the principles of those decisions. Now, my Lords, it has been found in that case of Duntreath, and a variety of other cases, that the first person named in the entail, called the institute, is not restricted by those clauses, if those clauses apply by description only to the heirs of tailie; and, my Lords, it has been remarked frequently upon this subject, as singular enough, that although it is admitted that the institute may be restrained, either nominatim or by effect, yet in the Act of 1685 the expression is merely 'heirs of tailie.' It enacts, 'that it shall be lawful to his Majesty's subjects to taillie their lands and estates, and to substitute heirs in their taillies, with such provisions and conditions as they shall think fit, and to affect the said taillies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of taillie to sell, annaizie, or dispoine the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprised, adjudged, or evicted from the other substitutes in the taillie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void; and that the next heir may, immediately upon contravention, pursue declarator thereof, and seize himself heir to him who died last infeft in the fee, and did not contravene, without necessity anywise to represent the contravener: it is always declared, that such taillies shall only be allowed in which the foresaid irritant and resolute clauses are insert in the procuratories, resignations, and charters,' and so forth.

Your Lordships perceive, that though it is admitted the institute

June 10. 1825. may be bound by these clauses, on which there is no dispute, yet he cannot be bound by the description of the heir of taillie; and in the case of Duntreath, where those clauses applied only to the heirs, though in other parts of the deed the institute was mentioned in this way,—A, B, and the other heirs of taillie,—it was declared by an authority not to be shaken, and the principle of that case must be applied to other cases under such an entail as that,—that as the institute was not to be considered an heir of taillie, he must be fettered, either by naming him expressly, or by some other expression clearly doing that.

It is not my intention to go through minutely the various cases which have been cited and commented upon at your Lordships' Bar. Two cases have, however, been mainly relied upon, one for the appellants, and the other for the respondent. The case of *Steel v. Steel* on the part of the appellants, and the case of *Syme v. Ronaldson Dickson* on the part of the respondent. Now, my Lords, in order to apply these rules,—because the only question is with respect to the application of the rules; there is no difference of opinion, nor can there be, as to the principles themselves,—in order to apply these rules and principles, it is of the utmost importance to look to the instrument itself, and to consider the language of the entail. My Lords, in this entail, as I have stated to your Lordships, the lands are disposed 'to myself in liferent, and to the said Henry Glassford, my son, in fee, and the heirs-male of his body; whom failing, to James Glassford;' so that Henry Glassford the son is the institute in this entail. He then goes on afterwards to impose restrictions upon the parties to whom this estate was destined; and those restrictions begin as usual, with what is called the prohibitory clause; and there it is provided, 'And that it shall not be lawful to, nor in the power of, the said Henry Glassford, or any of the heirs of taillie and provision substituted to him as before written, to alter, innovate, or change, or to do or grant any act or deed which may have any effect, directly or indirectly, to alter, innovate, or change this present taillie, and the order of succession hereby established, or to be established by any nomination or other writ relative hereunto, which I may hereafter make and execute, or any part thereof; nor to sell, wadset, or dispose the said lands and others, or any part or portion thereof; nor to grant rights of annuity or annualrent payable forth of the said lands and others, or any security upon the same, or any part thereof, redeemable or irredeemable; nor to contract debts, either before or subsequent to their succession, or allow or suffer the duties and casualties payable to the superior, or any other burdens legally affecting the said lands and others, to remain unpaid, or to do any other act or deed whereby the said lands and others, or any part thereof, may be appraised, adjudged, or otherwise evicted or encumbered.'

Your Lordships perceive Henry Glassford is named expressly. There is no doubt he is comprehended in some of the clauses in question, the irritant and resolutive clauses, which are here rather compre-

June 10. 1825.

headed in one clause, consisting of two branches ; and it begins in this way :—‘ And provided also, and it is hereby expressly provided and declared, that in case the said Henry Glassford, or any of the heirs of tailie and provision substituted to him as before written, shall fail or neglect to observe and fulfil any one or more of the conditions before specified, or shall do or act contrary to, or contravene any one or more of the limitations and prohibitions before written, then, and in every such case, not only shall all and every one of such acts and deeds, with all that shall happen, or be competent to follow thereupon, or upon the failure or neglect to observe and fulfil any of the foresaid conditions or provisions, be, as they hereby are declared to be, funditus void and null, and of no force, strength, or effect whatever, in the same manner as if no such failure or neglect had ever happened, and as if no such acts or deeds had ever been done or granted ;’ but also,—your Lordships perceive, not only that the heir or the heirs of tailie shall do so and so, but also—‘ each and every heir or person so contravening or acting contrary to the said limitations and prohibitions, or any of them, or failing or neglecting to fulfil the said conditions and provisions, or any of them, shall, for himself or herself alone, immediately on such contravention, failure, or neglect, forfeit, amit, and lose all right and title which he or she previously had, or has, or can claim or pretend to the said lands and others, or any part thereof ; and the same shall ipso facto and immediately devolve upon and belong to the next heir of tailie existing at the time, who shall prosecute and declare such irritancy, albeit descended of the failiier or contravener’s own body.’

Now, my Lords, the question which has been raised in this case upon this second branch of the clause, which is the resolute branch of it, is this :—It is contended, that inasmuch as Henry Glassford’s name is not there actually expressly repeated, the words ‘ every heir or person so contravening,’ do not include him ; that though the word ‘ person,’ if used alone, ‘ every person so contravening’ might have included him, yet, that being coupled with the word ‘ heir,’ this branch of the clause points only at those who, under this entail, fill strictly and correctly the character of heirs of tailie, which they say, and say correctly, the institute does not.

My Lords,—There are many other parts of this instrument from which it has been contended, that, looking at the language which is used in these different clauses, beginning in this way,—‘ It shall be lawful to, and in the power of the said Henry Glassford, or any of the heirs who shall have succeeded to the said lands ;’ afterwards, ‘ it shall be lawful to, and in the power of the said Henry Glassford, and the other heirs of tailie,’ and so on, the person who framed this deed as the entailor, did certainly consider that Henry Glassford was an heir of entail, and that, therefore, taking this part of the deed in connexion with, or in explanation of this resolute clause, it ought to be considered, that

June 10. 1825. the words 'every heir or person' mean, that class of persons in this destination who filled the character of heirs of entail, and were not intended to include Henry Glassford the institute.

My Lords,—The case of Steel, a very high authority, the very highest, because decided by your Lordships, and after very great consideration, has been pressed very much upon your Lordships as a decision that ought to govern the present case; and therefore, my Lords, it is important that I should state to your Lordships what the nature of that case was.—In that case there was an entail of the estate of Baldastard in favour of the entailer 'in liferent, for his life-rent use only, and then to George Steel, his nephew, and Harriet Applin, his spouse, in conjunct fee and liferent, and the heirs whatsoever of the body of the said George Steel, in fee; whom failing, to his own nearest heirs and assignees whatsoever;' whereby George Steel became disponee or institute under the deed. The procuratory of resignation was granted in terms of the above dispositive clause, but declared to be also under the 'conditions, prohibitory, irritant, and resolute clauses, powers, and faculties after expressed and appointed to be inserted in the charters, sasines, &c. of the foressaid lands in all time coming, and to be observed by all my heirs and substitutes above named.' The deed then, after providing, primo, 'That in case the estate should devolve on heirs-female, the eldest daughter should succeed without division,' proceeded with the prohibitory, irritant, and resolute clauses as follows:—'Secundo, 'That every person and heir, whether male or female, who shall succeed to the foressaid lands, &c. and their heirs and successors whatsoever, shall, immediately upon their accession, assume and take, and afterwards bear and carry, the surname and arms of Steel of Baldastard. Tertio, That it shall not be leisome or lawful to any of the said heirs or members of taillie, or their descendants, who shall succeed to his estate, to bruick or enjoy the same, or any part thereof, by any right or title whatsoever other than this present deed of entail. Quarto, That it shall not be leisome or lawful to, or in the power of all or any of the said heirs, to alter, innovate, or change the order of succession above laid down, nor yet to do any other act or deed, directly or indirectly, whereby the same may be any ways innovated or changed; nor yet to grant tacks for any space longer than 19 years, nor to accept of any tack-duty under the present rental, at least not without a regular roup, publicly advertised in the Edinburgh newspapers. Quinto, That it shall not be in the power of all or any of the said heirs or members of taillie, or their successors, to sell, dispoone,' and so forth. 'Sexto, That the said George Steel and Harriet Applin, and the whole other heirs and members of taillie above-mentioned, and their heirs and successors who may happen to succeed to the said lands and estate, shall be bound and obliged to pay Ann Applin, presently residing with me, daughter of William Applin, clerk in the East India House at Lon-

‘don, deceased, an yearly annuity of L.100 sterling, after my decease, June 10. 1825.
 ‘at two terms in the year, Whitsunday and Martinmas, by equal
 ‘portions, beginning the first term’s payment thereof at the first term
 ‘of Whitsunday or Martinmas that shall happen after my death, and
 ‘so forth thereafter during her lifetime, with a fifth part more of pen-
 ‘alty in case of faille, and annualrent from each term’s payment till
 ‘payment of the same; which annuity is hereby declared to be a real
 ‘burden on the foressaid lands and estate during the subsistence thereof.
 ‘Septimo, That the whole heirs and members of taillie above-mentioned,
 ‘and their heirs and successors, who shall happen to succeed to the said
 ‘lands and estates, shall become bound, as, by their acceptance hereof,
 ‘they become bound and obliged to perform and observe every one of
 ‘the different clauses and articles before-mentioned; declaring always,
 ‘as it is hereby expressly provided and declared, that in case all or any
 ‘of them shall contravene, and do on the contrary hereof, or of any of
 ‘the conditions, provisions, and obligations before specified, or omit
 ‘and neglect the fulfilling and observing the same, such person or per-
 ‘sons so contravening, or omitting and neglecting, shall, immediately
 ‘upon such contravention, lose, tyne, and amit all right, title, and
 ‘interest which they have or can pretend to by this present deed; and
 ‘the succession to the foressaid lands and others shall immediately de-
 ‘volve upon and descend to the next heir substitute by this present
 ‘right, in the same manner, though descended of the contravener’s
 ‘body, as if they had been naturally dead, or not mentioned herein;
 ‘and the person so succeeding upon such contravention may take up
 ‘their titles to the foressaid lands and others by declarator, adjudica-
 ‘tion, or any other manner competent by law, without being liable to
 ‘the contravener’s debts or deeds, but subject always to the whole
 ‘clauses, prohibitory, irritant, and resolute, above-mentioned,’ &c.
 In a subsequent part of the deed, the entailer authorized ‘George
 ‘Steel and Harriet Applin, or any other member of this entail,’ to
 apply to the Court to have it recorded.

Now, your Lordships will perceive in this entail, except in the sixth
 clause, you do not find the institute named; and in that sixth clause,
 the institutes, George Steel and Harriet Applin, are named in this
 way,—‘That the said George Steel and Harriet Applin, and the
 ‘whole other heirs and members of taillie above-mentioned, and their
 ‘heirs and successors who may happen to succeed to the said lands
 ‘and estate, shall be bound’ to do what is there directed.

My Lords,—It was contended in that case, as it is contended in
 this, that the institute was not bound by those restrictions, inasmuch
 as he was not either mentioned nominatim, or by sufficient description,
 in any of the irritant and resolute clauses, which it was necessary he
 should be, in order to be bound. My Lords, a very elaborate interlo-
 cutor was pronounced in that case by the Lord Ordinary before whom
 the case first came; and he found, ‘that George Steel disposed of his
 ‘lands in favour of himself in liferent, for his liferent use only, and to

June 10. 1825. ' George Steel, his nephew, and Harriet Applin, his spouse, in conjunct fee and liferent, &c., whereby the said George Steel, junior, became disponent or institute upon the said deed.' He then found, ' that by the fifth clause of the entail it is declared, that it shall not be in the power of all or any of the said heirs or members of tailie, or other successors, to sell, disponent, wadset, &c.; and that the irritant clause following this prohibitory clause is directed against all debts, acts, and deeds, of all or any of the said heirs of tailie and substitution, or their heirs.'

Now, my Lords, upon this branch of the case my Lord Chancellor, in moving your Lordships' judgment upon it, remarked,—' The words are, all my heirs and substitutes,—though I do not say that ' an institute may not be included in the words members of tailie, yet it must be clear, that the entailer so intended it; and here he uses the words, " heirs and substitutes," which has a tendency to shew that he had in view in this instrument his heirs and substitutes only.' I mention this, to shew your Lordships that, in the Lord Chancellor's view of the law of Scotland, an institute might be included in the term or description of member of tailie; he could not where the terms were, heirs and substitutes, according to the previous authorities; and his opinion in this case was formed upon a view of the whole instrument, that in this case the words, ' members of tailie,' could not be considered as including the institute. I find this also mentioned by the Lord Chancellor:—' The Lord Ordinary finds, that in the sixth clause of the entail, where an annuity is granted to Ann Applin, the aforesaid George Steel, and Harriet Applin his spouse, is contradistinguished to the other heirs and members of tailie; where the institutes were named by name, as I have stated to your Lordships, the Lord Ordinary considered that they were named as contradistinguished to the other heirs and members of tailie. There George Steel is named in contradistinction to other heirs and members, and to the word " other." That form of expression occurred and was argued upon in the Duntreath case, but the argument did not there prevail. As I have stated to your Lordships on that part of the case, the sentence contained the words, " other heirs of tailie;" but that was not considered sufficient to include him, where the expression in the resolutive and prohibitory clauses were heirs of tailie only. Then the Lord Ordinary found, " that under these circumstances the expressions in the entail, of heirs or members, and of heirs and members of tailie, cannot be held to apply to George Steel the disponent or institute, but that the expressions, " heirs or members," or " heirs and members," must be held as synonymous terms, that is, with heirs and substitutes, mentioned in the first part of the deed." Then the Lord Chancellor says,—' Agreeing in these findings of the Lord Ordinary and the Court, I think the result under this instrument is such as they have found it to be; and it appears to me that other passages in this instrument lead to the same result." The Lord Chancellor was so anxious to have it declared upon what grounds the House

went, that he proposed to find that, under the particular circumstances mentioned in the Lord Ordinary's interlocutor, and adverting also to the whole of the circumstances as they appeared in the instrument, the word members, as used in the deed, did not include the institute. My Lords, it does not follow that another instrument might not be framed, in which the words, members of tailie, might not include the institute though not expressly named. June 10. 1885.

Now, my Lords, this is a case which has been relied upon in this case for saying, that looking at the manner in which those rules were applied in the case of *Steel v. Steel*, though there the words, 'members of entail,' which in their proper construction may be considered as including not only the heirs of entail but the institute; still, in that case, it was not considered sufficient to include the institute by that description, he not having been named excepting in the other clause, in which he was named as contradistinguished from the other heirs of entail; and when that occurs in this case, which I believe has not occurred in any of the others, that the institute here is expressly named in the prohibitory and at the commencement of that other clause, which is afterwards divided into two members or branches; in fact, the introduction of the irritant and resolute clauses.

My Lords,—The case cited on the other side (the only difficulty being, not the rule itself, but the application of it) is the case of *Syme v. Ronaldson Dickson*. I would not detain your Lordships upon this case, but that I feel, considering the decisions which have taken place upon this subject, it is extremely important I should explain to your Lordships, as clearly as I can, the grounds of my judgment; for I am free to admit that this is, as it has been stated at your Lordships' Bar and argued, an extremely important case, as affecting that which is a most important branch of the law of Scotland. Now, my Lords, the case of *Syme v. Dickson*, which was cited in the Court of Session, as it appears to be correctly stated in the respondent's case, is this:—
 'Andrew Ronaldson executed an entail of his lands of Blairhall and others, containing a procuratory of resignation in favour of himself in life, and of John Ronaldson, his eldest son, and the heirs-male to be lawfully procreated of his body, in fee; whom failing, to his younger children, and certain other substitutes.' The prohibitory, irritant, and resolute clauses, were as follows:—
 'Sixthly, Providing and declaring always, as it is hereby expressly provided and declared, that it shall not be lawful to nor in the power of the said John Ronaldson, my son, or any of the other heirs of tailie above-mentioned, whether male or female, or the descendants of their body, to sell, alienate, wadset, dispone, or grant in feu-farm, either redeemably or irredeemably, except as hereafter mentioned, the lands and estate above resigned, or any part or portion thereof, or to contract debts or grant bonds, or other securities, of whatever nature, whether heritable or moveable. Eighthly, Providing and declaring always, as it is hereby expressly provided and declared, that in case my said

June 10. 1825. 'son, or any of the heirs of tailie appointed to succeed him in manner before-mentioned, shall fail in the performance of all or any of the conditions, provisions, limitations, declarations, and others specified in the second, third, fourth, fifth, sixth, and seventh articles of this present deed of entail, which are held as word by word repeated for the sake of brevity, or in the performance of any one article thereof, then, and in either of these cases, not only shall all such acts, facts, deeds, conveyances, bonds, adjudications, or other writs, of whatever nature, executed, subscribed, led, deduced, or permitted to be deduced, done, or executed, contrary or inconsistent with the foresaid provisions, conditions, and others contained in the said six articles, being themselves absolutely void and null, but also the person or persons, heirs of tailie aforesaid, so contravening these conditions, shall, for him or herself alone, but not for the descendants of his or her bodies, forfeit all right, title, or interest to the lands and others before resigned, or any part or portion thereof, or rents, mails, and duties of the same, and all the right of succession otherwise competent to them to the lands and others aforesaid, and the same shall immediately thereafter fall and belong to the next heir of tailie.'

My Lords,—It was there contended, as it is contended in this case, that the institute could not be considered as comprehended within the words 'person or persons, heirs of tailie aforesaid;' but it was argued on the other side that it was so intended; for when you look back to see who the heirs of tailie were, you find that they were his son, or any of the heirs of tailie appointed to succeed him in manner before-mentioned; and therefore in that case the Court thought the reference to the institute in the resolute clause was sufficiently explicit to bring him under the entail, and assoilzied the defender. And, my Lords, that judgment was affirmed by this House, so that the word 'person' was considered as sufficiently designating the institute. Now it is said that the case of *Syme v. Ronaldson Dickson* was a less favourable case for the entail than the present,—that it differs from the present chiefly in this, that in that case the words 'person or persons, heirs of tailie aforesaid,' were in grammar perfectly capable of a construction which, under the rule fixed by the *Duntreath* case, must exclude the institute,—that it was only necessary to read the words thus, person or persons, heirs of tailie; that is, the son or other persons, heirs of tailie; that is, the other heirs of tailie appointed to succeed him mentioned in the preceding clause, and yet there was held to be a sufficient reference to the institute.

But what is the language of this instrument? After stating, that if Henry Glassford, or any of the heirs of tailie and provision, shall fail or neglect to observe any of the conditions, or shall contravene any one or more of the limitations and prohibitions, such acts and deeds shall be void, the words which follow are, 'but also each and every heir or person so contravening.' Then, my Lords, we are to look back and see what are the words in the preceding part of the

same sentence, because your Lordships will perceive it is all one branch of the same sentence divided into two branches. Then when you look back to see who are the persons previously stated, you find they 'are Henry Glassford, or any of the heirs of taillie;' therefore I cannot but think that the words in this case, 'every heir or person,' will, by reference to the preceding part of the clause, not only be intended, but in grammatical construction and fair reasonable construction must be considered, as comprehending Henry Glassford, the institute, who had been previously named as the person who might contravene by possibility the fetters of this entail. June 10. 1825.

Without troubling your Lordships with the various other cases to which reference has been made, because it would be only consuming your Lordships' time to enter into the distinctions which take place between one case and another in point of language, because the principle applies,—whether rightly or wrongly, it is not for me to say,—but the principle in all those cases is the same, and the cases must resolve themselves into the same principle, considering the strictness with which entails are to be construed, particularly in favour of the institute. Bearing this in mind, and keeping it constantly in view, in order to arrive at a proper and consistent conclusion, I say that, looking at this clause of the instrument, and looking at the other parts of it—for the other parts of it are to be made the subject of reference in the construction of this particular clause—finding that, in the other clauses of the deed, the word 'heir' is coupled with the institute, Mr Glassford; the question is, looking (to use the expression of the Lord Chancellor in the case of *Steel v. Steel*) at all which is to be found within the four corners of the instrument, and considering the fair legitimate construction to be applied to the whole instrument; keeping in view those distinct rules, which, I say, must be kept in view in considering instruments of this kind,—can it be said that Mr Henry Glassford is not included as an heir and person so contravening, when he himself is stated in the preceding part of the sentence by name as a person who may contravene, and may therefore be subject to the forfeiture?

My Lords,—I do humbly state to your Lordships my decided conviction, upon a consideration of the cases which have been referred to, that the opinion that the majority of the Court of Session have formed upon this subject is the right conclusion. There is one very learned person who differed from them, but who spoke with great hesitation, who at least certainly entertained great doubts, but, upon the whole, considered the case of *Steel v. Steel* an authority for saying that the institute in this was not bound. After, however, considering the reasons which that learned person gave, and the reasons which have been so very ably urged at your Lordships' Bar, it does appear to me, upon the grounds I have taken the liberty of stating, that the decision below is right, and therefore I shall humbly move your Lordships that the interlocutor be affirmed.

June 10. 1825. I have already stated the reason for my going so much at length into this case. Although I am about to move your Lordships for an affirmance of the judgment, I have thought it my duty, on a case on such a branch of the law, and where the cases run so very near each other, the distinctions between them being so very nice, to state to your Lordships at large, and as clearly as I could, the grounds on which I am humbly of opinion this judgment should be affirmed. I will only further move your Lordships, that this judgment be affirmed.

Appellants' Authorities.—*S. Ersk.* 8. 29.; *Bruce, Jan.* 15. 1769, (15,539.); *Bryon, Jan.* 22. 1760, (15,511.); *Ankerville, Aug.* 8. 1787, (7010.); *Moncreiff, March* 3. 8104, (not reported, affirmed); *Ross, Nov.* 4. 1743; *Leslie, July* 24. 1732, (No. 49. *Elchies, Taillie*); *Erskine, Feb.* 14. 1758, (4406.); *Edmonstone, (case of Duntreath), Dec.* 24. 1769, (4409.); *Gordon, July* 8. 1777, (15,462. and No. 2. *Ap. Taillie*); *Menzies, June* 25. 1785, (15,436. *Rem. June* 30. 1801); *Wellwood, Feb.* 23. 1791, (15,463.) and *May* 31. 1797, (15,466.); *Titchfield, May* 22. 1798, (15,467. affirmed); *Jan.* 20. 1800, (No. 4. *Ap. Taillie*); *Miller, Feb.* 12. 1799, (15,471.); *Steel, June* 24. 1817, (5. *Dow, p.* 72.)

Respondent's Authorities.—*Syme v. Dickson, Feb.* 27. 1799, (15,473. affirmed, *April* 26. 1803), *Logan, Dec.* 13. 1797, (11,379.)

J. CAMPBELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 37. SOLICITORS in the SUPREME COURTS of Scotland, Appellants. *Shadwell—Lushington.*

KEEPER and CLERKS of his MAJESTY'S SIGNET, Respondents.
Warren.

College of Justice.—*Found,* (affirming the judgment of the Court of Session), That it is the privilege, and has been the practice of the Court of Session, to regulate the accommodation necessary for the different bodies composing the College of Justice in the Inner and Outer-Houses; that the Incorporation of Solicitors have no right to demand any specific accommodation beyond what is necessary for attending the daily business of the Court; that such accommodation had been assigned to them equally with other agents; and that an action at the instance of the Incorporation, for further special and general accommodation as a matter of right, and particularly in relation to the conclusion that they had any real and just right and title, with any other class of practitioners, to possess the areas set apart for practitioners and others, is incompetent.

June 10. 1825.

1st DIVISION.
Lord Alloway.

THE Court of Session hold their sittings in three apartments:—1. The Outer-House, or Great Hall, in which the Scotch Parliament anciently assembled, and where the Lords Ordinaries now sit separately as single Judges, to hear causes when first moved in Court, or under remit from the Inner-House: 2. The Inner-House of the First Division, for hearing causes carried for review, or for decision, from the Lords Ord-

naries attached to that Division, or having their origin in the Inner-House: 3. The Inner-House of the Second Division, for the same purpose. The Court of Justiciary generally meet in the Chamber of the First Division. These two apartments contain each a small gallery. June 10. 1825.

The Faculty of Advocates having been much incommoded in their professional occupations, application was made to the Court for the adoption of an arrangement that would remove the inconveniency arising from idle people filling the passages and seats, and afford free access to the front Bar of the Chambers in which the Inner-House held their meetings. The Clerks or Writers to the Signet, having experienced similar inconveniency, also applied (in conjunction with the Faculty) to the Court; and the result was, an apportionment of a certain space to the Faculty and Writers to the Signet respectively, with authority to appoint servants to exclude all intruders.

The incorporated Society of Solicitors before the Supreme Courts considered themselves aggrieved by an arrangement, in which they thought they saw an invidious distinction created between them and the Writers to the Signet, and an attempt to throw discredit on their respectability as individuals and as a body; particularly to a part of the arrangement which implied the privilege of the Writers to the Signet to wear gowns; and thereupon raised an ordinary action against the Dean of the Faculty of Advocates, as representing that body, and the Keeper, Deputy-Keeper, and Clerks to the Signet, setting forth, That in virtue of their charter of incorporation, prior rights and privileges, Acts of Sederunt, Acts of Court, and immemorial use and practice, they had the privilege of acting as agents or solicitors in all causes before any Supreme Court in Scotland; and, as such, have a right to a free and uninterrupted access to the several Court-rooms where the sittings of the respective Judges were held: That lately an attempt had been made by other practitioners to appropriate to themselves particular seats or parts of the areas of these Courts, and deny access to the pursuers; in particular, that the Faculty of Advocates, and Writers to the Signet, had appropriated to themselves certain seats and benches, placed their name on them, and appointed servants to exclude all other parties: That this exclusion interrupts, and is injurious to the pursuers' practice as solicitors, is an encroachment on their rights and privileges, and is insulting and degrading, contrary to the statute June 12. 1673, and is unsanctioned by Act of Sederunt, Act of Adjournal, public regula-

June 10. 1825.

tion of Court, or any authority whatever; and therefore concluding that it should be declared, that the pursuers have an equal right and title with any other class of practitioners, to possess, occupy, and enjoy, all or any part of the areas, seats, and benches of the Courts, heretofore set apart for practitioners and others; and the defenders ought and should be ordained, in all time coming, to cease and desist from troubling, molesting, or in any way impeding the pursuers in the exercise of their rights and privileges as agents and solicitors in these Courts; particularly, in the enjoyment and occupation, equally along with themselves, of the areas, seats, and benches, heretofore set apart for the practitioners and others, excepting the front Bar occupied by Counsel in cases under actual discussion; and, that the defenders should be ordained to remove the railings, erase the inscriptions, discharge the servants, &c. The pursuers did not insist in this action against the Faculty; but the Writers to the Signet stated in defence,—1. That, in making the order and appointment complained of, the Court exercised a power necessarily inherent in every Court of Justice. It was not an exercise of judicative power, but an internal regulation of Court. If, therefore, the pursuers felt themselves aggrieved, they might apply to the Court to alter the order; but it was incompetent to proceed by ordinary action against the parties to whom the Court had granted the accommodation challenged. 2. That even were it competent to enter, in the present action, into the inquiry, the order was just and proper, and the regulations wise and judicious. The Lord Ordinary ordered informations; and the Court found (27th February 1824), ‘ that it is the ‘ undoubted privilege, and has been the constant practice of this ‘ Court, as appears from various Acts of Sederunt, to regulate ‘ the accommodation necessary for the different bodies composing ‘ the College of Justice, both in the Inner and Outer-Houses; ‘ and that the pursuers have no right to demand any specific ‘ accommodation beyond what is necessary for the individuals of ‘ their body attending the daily business of the Court: find, that ‘ such accommodation has been assigned to them in common with ‘ the Writers to the Signet, and other agents before the Court: ‘ therefore find, that the present action, in so far as it concludes ‘ for any further special or general accommodation as a matter ‘ of right, especially in so far as the same concludes that ‘ the pursuers “ have an equal right and title, with any other ‘ class of practitioners in our said Courts of Justice, to possess, ‘ occupy, and enjoy, during the sittings of the Courts, all or any

‘parts of the areas of our said Courts, and seats and benches therein, heretofore set apart and appropriated for practitioners and others attending the Courts,’ is incompetent; and dismiss the said action accordingly; assoilzie the defenders from the conclusions of the libel specially directed against them, and decern; but find no expenses due.’*

June 10. 1825.

The Solicitors appealed.

Appellants.—1. In making the regulations complained of, the Court did not act judicially, as in deciding a dispute between parties, but assumed a power of granting privileges and honours, to the prejudice of the appellants. The challenge by action of declarator was therefore competent; and as there was a wrong done, it was competent to the appellants to demand redress in the form adopted by them. 2. The respondents have no legal right to claim that a portion of the halls of the two Divisions shall be withdrawn from the public and from the other practitioners. In the Court of Session the Writers to the Signet are merely law agents, having no higher privileges than other law agents: Their privilege of acting as clerks to the Keeper of the Signet is exercised elsewhere. 3. The appellants have not demanded any specific accommodation in the halls of the Court of Session, and it is certain that no accommodation has been allotted to them, ‘in common with the Writers to the Signet.’ On the contrary, the complaint is, that this body have obtained for themselves specific accommodation, and they adhere to it with tenacity, as the means of exhibiting themselves to litigants and the public as a highly privileged class of practitioners, enjoying peculiar favour with the Court. 4. The Court have no power to withdraw a considerable proportion of the Court-rooms from the public and practitioners generally, and to allot it by favour to a particular class of law-agents. The Judges are not proprietors of the Court-rooms. Whatever powers they have, are granted for ‘ordouring of proces and hastie expedition of justice.’ This excludes all proceedings founded on mere will, favour, or arbitrary preference. Neither has the Court a title to confer honour or dignities: it has no right to say that a class of law-agents, clothed in gowns, shall be privileged to exclude other law-agents as less honoured, favoured, and esteemed, from a portion of the Court-rooms, and to oblige them to herd among the multitude. 5. There is no reason of expediency that justifies such a measure. It has no tendency to facilitate judicial

* 2. Shaw and Dunlop, No. 689.

June 10, 1825. proceedings; on the contrary, it crowds the passages of the Court-rooms, and impedes the access of the practitioners.

Respondents.—1. The action is clearly incompetent. The Court has exercised a privilege belonging to every Court of Law; and having acted ministerially, or in its administrative character, the appellants, if they thought themselves aggrieved, ought to have applied at once to the Court for redress, but should not have called the respondents as defenders. But, 2. The regulations interfere with no rights or privileges of the appellants. The same access and accommodation are given to them, while professionally engaged, as to the respondents. No injury has been done, nor rights disregarded. If, however, a comparison as to precedence or privilege be instituted, there is no doubt but it is in favour of the respondents, who are not known to the Court merely as agents, but in the original character of clerks to his Majesty's Signet. The accommodation granted to the respondents was obtained by application to the Court; and if further conveniences were desired by the appellants, the same course is open to them. But a minute detail of the merits of the case is quite unnecessary, since they cannot be listened to in the present action.

In the course of the argument at the Bar, the Counsel for the appellants admitted that they could not dispute the power of a Court to regulate the proceedings before it. On the Counsel for the respondents rising, they were stopped.

The House accordingly ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 150 costs.'

LORD GIFFORD.—This is a complaint made by a very respectable, and a very considerable body of practitioners in the Court of Session. The complaint is made against the Faculty of Advocates, and Writers to the Signet; and the grievance complained of is, that, by an order of the Court, the Solicitors are excluded from a considerable part of the body of the Court-rooms.

The appellants' Counsel very properly admitted, that they could not dispute the right of a Court in general to regulate the proceedings in that Court.

In 1821 it was thought necessary by the Court of Session to make a regulation, allotting certain seats to the Advocates and other persons.

The front row at the Bar was allotted to the Advocates engaged in causes actually in hearing. The second row to the Agents generally of every description engaged in those causes. Another portion of the

seats they allotted also for the Advocates, and a portion also to the Writers to the Signet. June 10. 1825.

The appellants stated in their summons, that they had a right to a full, free, and uninterrupted access to the several Court rooms; and concluded, that it ought to be found and declared, that they had an equal right and title with any other class of practitioners to occupy the seats, and that the Faculty of Advocates and Writers to the Signet should cease to prevent them from doing so.

It was stated at the Bar, that the proceedings against the Faculty of Advocates were abandoned.

It has been stated also, that the appellants, as agents employed in conducting causes, ought to have free access to the Courts. But here they are, as a body, seeking to have a place in the Courts allotted to them; or, if that shall not be so done, that the Writers to the Signet should have no place peculiarly allotted to them.

It should be recollected, that regulations of this kind are made, not only for the benefit of the practitioners in the Court, but for the benefit and advantage of the public in general also.

Considering the respectability of the body who are the appellants, I cannot help regretting, that when they found the allotment of seats made, by which they thought themselves aggrieved, they did not make a respectful representation to the Court. I am sure it would have been attended to. Instead of doing this, however, being hurt at the preference which had been given to the Writers to the Signet, they chose rather to bring the question here.

There certainly is, in my opinion, no foundation for making this complaint in this form; and I shall therefore move the affirmance of the judgment.

Appellants' Authorities.—Act of Sed. June 23. 1750; 1872, c. 16. § 31.; Act of Sed. Aug. 10. 1754; Sir Ilay Campbell's Act of Sed. p. 58.; Pitmedden's MS. Books of Sed. p. 68.; Act of Sed. Jan. 29. 1642; Feb. 28. 1662; June 22. 1665; Nov. 3. 1671; Feb. 3. 1685; Dec. 16. 1686; Nov. 6. 1690; 1693, c. 27.; Act of Sed. Feb. 12. 1754; 1540, c. 93.

Respondents' Authorities.—Act of Sed. Feb. 3. 1685; Feb. 12. 1754; June 12. 1760; Aug. 18. 1754; Feb. 23. 1687; June 17. 1746; Nov. 2. 1748; Jan. 28. 1756.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

SARAH GRAHAME, and Husband, Appellants.—*Shadwell—Stuart.* No. 38.

FRANCIS GRAHAME, Respondent.—*Brougham.*

Clause—Process—Res Noviter.—Found, 1. (affirming the judgment of the Court of Session), That deeds on public record cannot be regarded as *instrumenta noviter reperta*, so as to entitle a party to found on them under the rule *res noviter veniens*,

&c. 2. That a clause in a procuratory of resignation, 'that the eldest son, and 'the descendants of his body, shall always succeed preferably to the younger 'sons, and 'their descendants,' did not alter or qualify a destination in the dispositive clause to heirs-male of the marriage; whom failing, heirs-male of any other marriage; whom failing, heirs-female of the marriage; so as to let in a daughter of the eldest son (his issue male failing) in preference to that eldest son's next brother.

June 14. 1825.

1st DIVISION.
Lord Gillies.

WILLIAM GRAHAME of Morphie, having in contemplation to marry Catherine Ogilvie, (who brought and assigned to him 17,500 merks), his father, James Barclay of Ballendarg, by contract of marriage, (1748), containing the fetters of a strict entail, 'with and under the reservations, burdens, provisions, faculties, 'restrictions, and irritancies after written,' gave, granted, and disposed 'to and in favour of the said William Grahame of 'Morphie, his eldest lawful son, and the heirs-male to be procreated of the marriage betwixt him and the said Mrs Catherine Ogilvie; whom failing, to and in favour of the heirs-male lawfully to be procreated of the body of the said William Grahame of any after marriage; whom failing, to the heirs-female to be procreated of the marriage betwixt the said William Grahame and Mrs Catherine Ogilvie; whom failing, to the heirs-female lawfully to be procreate of the body of the said William Grahame of any after marriage; whom also failing, to and in favour of Robert Barclay, second lawful son of the said Mr James Barclay, and the heirs-male lawfully to be procreated of the body of the said Robert Barclay; whom failing, to the heirs-female lawfully to be procreate of his body; whom all failing, to any other person or persons that shall be afterwards named and called by the said Mr James Barclay to the succession of the lands and estate after disposed, and their heirs and assignees respectively, in the order he shall appoint,' &c. all and hail the lands of Ballendarg, Little Mill of Forfar, and others. The deed contained procuratory of resignation for new infestment to William Grahame, and the heirs of taillie and provision; 'but with and under the reservations, burdens, provisions, 'faculties, restrictions, and irritancies after written, which are 'expressly to be inserted in all the charters, retours, conveyances, and infestments of the whole lands before disposed, and 'in all charters thereof,' &c. Then, after reserving James Barclay's own liferent, this provision followed:—'Provided also, as it 'hereby is, and by the charters, infestments, and other writs to follow hereupon, shall be expressly provided and declared, that the 'eldest son and descendants of his body shall always succeed preferably to the younger sons and their descendants, and that the

June 14. 1826.

‘ eldest female and her descendants shall succeed without division, and exclude the younger females and their descendants from being heirs-portioners.’ The heirs, male and female, were then taken bound to bear the name and arms of Grahame, and power was given to make reasonable liferent provisions to spouses, and provisions to younger children, whether male or female. Of this marriage there were two daughters, but no sons. Catherine Ogilvie died, and William Grahame married Wilhelmina Barclay of Almericroa. By her he had three sons, Robert, Francis, and James; and two daughters. He died in 1776, and Robert expedited a service to him, as nearest lawful heir-male of taillie and provision; and was infeft upon a precept from Chancery. Robert died in 1793, having a son who died in infancy, without any titles having been made up, and a daughter Sarah. Her uncle Francis took out briefs from Chancery, and was duly served heir-male of taillie and provision to his brother Robert, and entered into possession.

After being in possession twenty years, Francis was called as defender in an action of reduction of his service, at the instance of Sarah (having attained majority), who claimed the estates as heir of taillie and provision of her father Robert, under the tailied succession in the marriage-contract 1748, being the descendant of the body of Robert Grahame, and the entail bearing, that ‘ the eldest son and descendants of his body shall always succeed preferably to the younger sons and their descendants.’ Francis Grahame, in defence, stated, that according to the sound and consistent interpretation of the deed of entail, he was the heir entitled to take up the succession; the word ‘ descendants,’ meaning merely male descendants. The Lord Ordinary found, ‘ that by the settlement in the contract of marriage betwixt William Grahame of Morprie and Miss Catherine Ogilvie, under which the pursuer’s father, the late Robert Grahame, succeeded to the lands of Ballendarg and others, as eldest son and heir of taillie to his father, the deceased William Grahame, the pursuer, upon the death of the said Robert Grahame without issue male, was entitled, as his eldest daughter or descendant, to succeed to the said lands in preference to the defender, the second son of the said William Grahame; and therefore, in so far repelled the defences, and sustained the reasons of reduction.’ Thereafter, however, his Lordship having ordered informations to the Court, their Lordships altered the interlocutor, sustained the defences, and assoilized the defender. The pursuer then reclaimed; and the Court, in respect of the importance of the

June 14. 1825. law of the case, ordered a hearing in presence. Counsel being heard,—

**Lord Hermand* observed,—More has been made of this case than I could have conceived; more than its merits can justify; for the mere recital of the clauses in the appendix, when compared with the authority of Lord Stair, and with the rules of construction laid down by the pursuer herself, brings it to the clearest issue.

The dispositive clause contains the following destination:—
(His Lordship then read the clause; see ante, p. 354.)

It is not pretended that there is the smallest doubt as to the meaning of this clause. It is in favour of the heirs-male of the first marriage with Catherine Ogilvie; of the heirs-male of any subsequent marriage; of the heirs-female of the first marriage. William Grahame's heirs-male by a second marriage have, by this clause, a preference over the heirs-female by the marriage between him and Miss Ogilvie.

It is unnatural, perhaps, to alter the regular course of succession founded upon the law of nature, and the general feelings of mankind. But it is congenial with that preference of male succession, incident, as every body knows, to landed proprietors in Scotland. Under that impression, I should not have been surprised if the granter had excluded females altogether. I have seen such settlements, even in the case of a man's own daughters. This deed, however, does not exclude the daughters of the marriage with Miss Ogilvie from all hope of succession; but only prefers the heirs-male of any subsequent marriage to the daughters of that first marriage.

But this is said to have been altered or explained by a clause in the procuratory of resignation. In that view, I lay no stress upon the particular part of the deed where it is inserted, or its want of juxtaposition. But I consider the purpose and object of this relative clause as expressed in itself. The words are, 'And for making the saids infeftments in the lands and others before disposed, in the respective events before expressed, effectual by resignation,' &c.

Now, what is the way in which this effect is to be produced? According to the pursuer, it is to overturn the deed, by making a relative subordinate clause the instrument of destroying that leading clause which it professes to make effectual.

* These are the speeches which were laid before the House of Lords, and which were said to have been revised by the Judges.

June 14. 1825.

But no such harsh language can be applied to this clause. It admits subordination to its chief, nor contains a syllable tending to violate the allegiance it so clearly professes. Let it speak for itself: 'Provided also, as it hereby is, and by the charters, 'infestments, and other writs to follow hereupon, shall be expressly provided and declared, that the eldest son, and the 'descendants of his-body, shall always succeed preferably to the 'younger sons and their descendants; and that the eldest female, 'and her descendants, shall succeed without division, and exclude the younger females and their descendants from being 'heirs-portioners,' &c. There is no contradiction, nor appearance of contradiction, in these clauses. A son is as much a descendant as a daughter; and, since heirs-male are expressly called in the dispositive clause, why set the two clauses at variance, in themselves intelligible and consistent?

The clause, indeed, was not very necessary; but may have been introduced to remove some doubt of the granter himself, a half-bred lawyer, who may have heard of the first case of Bargany without understanding it.

'Descendants,' equally applicable to sons, must here be confined to them, on a just construction of the whole deed. For I agree with the pursuer, that the whole deed must be taken together, and a construction adopted which applies to the whole.

Were there any uncertainty, it is removed by the immediately succeeding clause, illustrative of the generic force of the term 'descendants,' as already explained. 'And that the heirs, both 'male and female, and the husbands whom the heirs-female shall 'marry, or to whom they are married at the time of their accession to the said estate, and their heirs, shall be holden obliged, 'from that time forward, to assume the surname of Grahame,' &c. This clause is a complete commentary, were one necessary, upon the term 'descendants' used in the former. It is a flexible term, applicable to all descendants, or, according to circumstances, to male or female descendants, as the case may be; and here it must be explained consistently with the leading clause of destination. For it is impossible that the term 'descendants' in the procuratory, should have the effect so as to alter the clause of destination. Were more necessary, look at the clause on the 18th page of the appendix, as pointing out the intention of the granter. It is adapted to the very event which happened, that the heirs-female, even of the first marriage, should be excluded. 'Likeas, in case the succession to the foressaid lands and estate 'shall devolve upon the heir-male to be procreate of the body of 'the said William Grahame of any after marriage, he, with con-

June 14. 1823. 'sent of his said father, binds and obliges him, his heirs and successors, to make payment of the sums after specified to the daughters to be procreate of the marriage betwixt him and the said Mrs Catherine Ogilvie, at the terms, conform to the divisions, and in the manner after mentioned.'

It is obvious, that on the footing of the pursuer's argument such a clause was unnecessary, and indeed absurd.

It has been said, that there is no power of giving provisions to daughters, should they have a brother who took the estate; a thing not without precedent, on an idea not always realized, that a brother taking under an entail will not suffer his sisters-german to starve. In fact, however, there is a provision for daughters. For 'full power and liberty' is reserved 'to the said William Grahame, and the other heirs and members of tailie above-mentioned,' to make reasonable provision to their ladies and husbands; and 'to provide their younger children, whether male or female, in reasonable portions.'

I would now say a word upon the rules of interpretation laid down by the pursuer, and subscribe to almost all of them, particularly the doctrine of Lord Stair, (B. 4. tit. 46. § 12.) who says, that 'if there be different acknowledgments or declarations by the same person, posteriora derogant prioribus, which holds also in clauses in the same writ; for the posterior clauses, if they agree not with the former, do always qualify, correct, alter, or even take off the former, if they do fully contradict the same, or be inconsistent therewith; for parties, in forming of writs, which oftentimes are very long, are unwilling to alter the whole frame, which takes long time and expenses, and therefore do rather add posterior clauses not agreeing with the former.' Be it so; but the two clauses, when reasonably considered, do not contradict each other. The procuratory agrees with the dispositive clause, as will be obvious when they are fairly thrown together in one sentence, thus:—'To and in favour of the said William Grahame of Morphie, his eldest lawful son, and the heirs-male to be procreate of the marriage betwixt him and the said Mrs Catherine Ogilvie; whom failing, to and in favour of the heirs-male lawfully to be procreate of the body of the said William Grahame of any after marriage; whom failing, to the heirs-female to be procreate of the marriage betwixt the said William Grahame and Mrs Catherine Ogilvie; whom failing, to the heirs-female to be lawfully procreate of the body of the said William Grahame of any after marriage,' &c.

So far the dispositive clause; and in perfect consistency the procuratory proceeds, 'Provided also, as it hereby is, and by

‘the charters, infeftments, and other writs to follow hereupon, June 14. 1825.
 ‘shall be expressly provided and declared, that the eldest son,
 ‘and the descendants of his body, shall always succeed preferably
 ‘to the younger sons and their descendants; and that the eldest
 ‘female and her descendants shall succeed without division, and
 ‘exclude the younger females and their descendants from be-
 ‘ing heirs-portioners,’ &c.

Upon this simple statement from the deed itself, unless the granter had two minds at the same instant, not a doubt can remain as to his real meaning.

A procuratory of resignation is a subsidiary clause; but suppose that, as in the case of Gibson of Durie, by a marginal note the clause in the procuratory had been immediately subjoined to the destination in the dispositive clause, and been followed by the clause as to heirs-female, and the obligation for assuming the name and arms,—Is it possible, taking the clauses as constituting one declaration of will, to suppose, that the general term ‘descendants’ can be applied to heirs-female, who are excluded in the original destination?

If Mr Guthrie, the framer of the deed, had his wits about him, and truly meant an alteration, he must have inserted it in a marginal note. But the case is much weaker as it stands; for the subserviency of the relative clause, admitted in itself, cannot be laid out of view; and the genuine view of the matter is to be found in the speech of a noble and learned Lord, in the Roxburgh case. ‘When you are construing such a clause as this, ‘you are applying yourselves to the determination of a question, ‘which may depend upon principles entirely different from those ‘which would belong to the consideration of the question, if it ‘was a pure dry destination to heirs-male, or a pure dry destination to A and his heirs-male, without more;—that you are applying yourselves to the consideration of a question which arises ‘upon terms quite different, both in common parlance and in ‘legal language, from those I have last mentioned—which arises, ‘not out of a pure, short, dry limitation, described in strict legal ‘terms, connected with an unquestionable designation of an individual, and an individual only; but that you are applying yourselves to the consideration of a question which arises upon a ‘clause consisting of a great many expressions, a great many obscure expressions, and a great many expressions which consist ‘of terms unquestionably flexible; which consist of terms flexible ‘in common parlance, flexible in those instances which may be ‘produced from the language of the law. That in such a case,

June 14. 1825. ' therefore, your Lordships are to put the whole together—you are to see what belongs to each and every part of the terms used—and you are not to decide what would belong to any particular part, if it stood by itself unconnected with the rest—but you are to decide upon what is the meaning of each word, regard and reference being had to all the context; and I venture to go the length of saying, that if there has been anywhere an opinion that this clause cannot be construed but with reference to the words which form the clause itself, I venture humbly so far to differ from that as to say, I apprehend it may at least be construed with reference to every thing to be found within the four corners of that deed in which the clause is found.'

The pursuer appealed to the maxim, in dubio pro herede respondendum. True; but the heir of investiture is the favourite of the law; and the investiture of this estate was to heirs-male. By another maxim, doubtful words are to be interpreted contra preferentur. True, in the stipulations of the Roman law—but inapplicable to mutual contracts—and the present deed was a contract of marriage.

The pursuer has been equally unfortunate in her reference to other entails. The first was that of a small laird employing a schoolmaster to make an entail, who, being ignorant of the maxim *ai sine liberis*, inserted a long clause to insure what would have been implied without it. The entail of Kinnaird was drawn by able conveyancers; and were there any thing out of common course, it must be ascribed to their client, who, as observed by Mr Clerk, was not easily led. But there is nothing here of the kind. The destination in the first clause contains an exception; and, with an addition to the substitution, the second clause is precisely the same. It was said, that the clause calling the daughter of the last possessor would exclude the daughter of an eldest son, if he predeceased his father. It certainly would, and though uncommon in so near a degree, it appears highly natural in the more distant; and, if generally adopted, would put an end to the complaints so often made against entails, whereby a peasant may be called to an opulent succession, and daughters, educated to be ladies of rank, reduced to beggary.

To conclude, as well observed by Mr Jeffrey, heir is a generic term, and may be modified into heirs of the body—heirs of a marriage—heirs of investiture—heirs of line—heirs-male. But heirs-male is specific, and exclusive of females. A man may be heir-female; but a woman never can be heir-male.

The expression 'descendants' is equally generic, embracing

heirs-male and female, as called by the deed in which they occur; June 14. 1825. and the question, if it can be called a question, is simply this, Will an inflexible term yield to one that is flexible? It is the competition of a rod of glass with a bar of iron. The pursuer seeks a contradiction. But I, with the defender, take the whole deed together, and put a rational construction upon it.

Lord Sucoth.—I am of the same opinion as formerly in this case, which is certainly a question of nicety. One thing perfectly clear, and as to which both parties seem to be agreed, is, that although this is a question arising out of an entail, yet we are entitled, and indeed bound to ascertain the meaning and intention of the maker of the deed, if we can do so. In judging of the import of the deed, it is material to consider whether the two clauses founded on are contradictory. We must find out in the best way we can, from the context and whole clauses, what classes of heirs the maker of this deed meant to call to the succession. The only difficulty, then, which we encounter is, to find clear evidence of what was that intention.

It is sufficiently clear from the dispositive clause, near the beginning of the deed, that if that clause had stood alone, this is a male fee, in favour, first, of the heirs-male of the marriage with Catherine Ogilvie; and secondly, of the heirs-male of any subsequent marriage.

In point of fact, there was no heir-male of the first marriage; but the gentleman at present in possession of the estate, is an heir-male of the second marriage; while, on the other hand, Miss Grahame is an heir-female of that second marriage, being the daughter of the eldest son of the second marriage.

Such is the relationship between the parties; and there is no such question here as has often occurred under other deeds, viz. Whether the term 'heirs-male' may be qualified so as to mean heirs-male of the body, in consequence of some expressions occurring in an after part of the deed, though only the term 'heirs-male' be used in the leading clause of destination; a question which occurred in the Roxburghe case, and was attended with considerable difficulty.

The question in the case before us, is, Whether the term 'heir-male,' employed in the deed, can be so qualified as to bring in heirs-female to the succession?

It is not easy to see how heirs-female should be brought in under a destination to heirs-male. Here, the lady tries to qualify the term 'heirs-male,' which is used in the dispositive clause, by another clause, which is introduced into the procuratory of resignation.

June 14: 1825.

And before I go to the particulars of that other clause, and the way and manner in which it bears upon the destination clause, I would observe in passing, that the lady here is not one of the heirs-female who are first called by the destination clause of this entail; for she is not one of the heirs-female of the first marriage, who are called after the heirs-male of the first and second marriages, if there should be such; but she is an heir-female of the second marriage, and is claiming, even in preference to the heir-female of the first marriage. That is the shape in which she makes her claim. I just mention this in passing, because it does certainly strike one as a strange proposition, that she should be claiming the property as heir-female of the second marriage, in preference to the heir-female of the first marriage.

It is needless to advert minutely to the destination in the dispositive clause, as it is perfectly clear. As to the after clause, I agree, that the procuratory of resignation may be a proper part of a deed to bring in any clause that the maker chuses to insert; that he may insert a new clause there, making an entirely different destination from that which he made in the original dispositive clause of the deed. Such a mode of alteration would be very unusual; but there is nothing in point of law to prevent a person from adopting this mode of altering his original intention. And therefore, if I had seen clearly that this after clause, beginning with, 'Provided also,' &c. had contained an express alteration, in clear and unambiguous terms, I would have held myself bound to give effect to it, although certainly contradictory of the first clause. It would have been an awkward way of carrying such an intention into effect; but the clause would have been binding. If an alteration, of the description to which I allude, had been wished for, which is a complete destruction of the original destination clause, and a making of a new destination, care should have been taken to have had the thing done in clear and explicit words, so that there could be no doubt of what was intended. It is, I think, to such a case as the above, that the maxim, as to which we have had so much argument from the Bar, and in the printed pleadings, '*posteriora derogant prioribus*,' properly applies; and if the present case had been of that description, I would have given effect here to that maxim.

We may either take the case of different deeds, or that of different clauses in the same deed. This last applies to the present question. The plain rule of law is, that in construing any deed of this description, you are to hold the destination clearly stated in the dispositive clause of that deed, to continue through-

out, unless a contrary intention be announced in clear and express terms. We are not to go upon presumptions in such a case.

June 14. 1885.

We have here an odd sort of a clause, in some respects an absurd clause, inserted in the procuratory of resignation, by which it is stated, that 'the eldest son, and the descendants of his body, shall always succeed preferably to the younger sons and their descendants.' In order to see whether this second clause of the deed alters or qualifies the destination clause in the first part of the deed, it is necessary to attend to the principles upon which we ought to be regulated in such questions. In the first place, it is a clear principle of law, that technical and specific terms, such as occur in the destination clause of this entail, are not to be controlled by terms of a more general and flexible nature. The terms that occur in the destination clause of this deed, are specific, appropriate terms, viz. the 'heirs-male' to be procreated of two marriages. Upon the other hand, what are the terms which occur in the other clause, upon which the pursuer founds? 'That the eldest son, and the descendants of his body, shall always succeed preferably to the younger sons and their descendants.' The terms here used are, 'the descendants of the body of the eldest son.' I think it cannot be disputed, that the word 'descendants' is much more flexible than the term 'heirs-male of the marriage,' in the prior part of the deed. It is quite possible to make the term 'descendants' bend and apply to heirs-male; but the contrary is not possible. The term 'descendants' is of a much more general, as well as flexible nature, than the appropriate and specific term 'heirs-male.' The term 'descendants,' it is admitted, may mean either heirs-male or heirs-female, or it may mean both. It may have either or all these meanings, according to the context and the other clauses of the deed, from which the meaning of the parties must be gathered. It did appear to me, at the time this admission was made by Mr Clerk, (and he made it from necessity certainly), that the admission was decisive of this case. For it appears clearly, from the whole plan of this settlement, and clauses commented on, taking them together, and particularly from looking to the leading clauses of destination, that the testator wished to bring in and favour 'heirs-male.' That being (at least in my apprehension) sufficiently made out, must we not hold, that the word 'descendants,' used in this second clause, means what is consistent with that intention, so appearing from the first and leading clause of destination? If the words can be construed so as to mean

June 14. 1895. what is consistent with the leading intention, are we not bound to give them that meaning? We must read the word 'descendants,' as if it applied to heirs-male of the eldest son, agreeably to the intention of the parties evinced in the original destination clause. It has been admitted, that the term 'descendants' may mean heirs-male only; and if this be admitted, we have only to have recourse to what appears to have been the meaning of the maker of the deed: In short, upon the principle with which I set out,—that a flexible term of this description must yield to one which has but one determined meaning, we are bound to interpret the term 'descendants' in the manner I have mentioned.

The construction which is put upon the clause by the pursuer, appears to me to make a complete alteration of the destination in the first clause, and not merely a modification or qualification of it. Are we to admit of an alteration of this kind, in so material a particular as this, by implication, if it be possible to avoid it? I apprehend not.

We are told of the probability of Catherine Ogilvie and her friends having laid their heads together, and consulted for the protection of her rights and interest; but if so, is it likely that, looking to the possibility of her husband contracting a second marriage, after she should be in her grave, they would consent, that if there should be no heirs-male, but only heirs-female of the two marriages, the heirs-female of the second marriage should take precedence of the heirs-female of Catherine Ogilvie's own marriage? It is not at all probable they would have been brought to agree to such an arrangement.

If, again, the two adjoining branches of this clause in the procuratory of resignation be considered together, 'Provided also, as it hereby is,' &c. 'that the eldest son, and the descendants of his body, shall always succeed preferably to the younger sons and their descendants; and that the eldest female and her descendants shall succeed without division, and exclude the younger females and their descendants from being heirs-portioners,' the term 'descendants,' in the second part of this clause, is to be applied to females, in order to make sense of the clause. All this part of the clause is applicable to females succeeding without division, so that, in the latter part of it, the term 'descendants' can denote females only. If this be a fair interpretation of the second part of this clause, why may we not also apply the term 'descendants' in a limited sense in the first part of it? The word 'descendants,' therefore, must, I think, apply to heirs-male only, in the first part of the clause.

According to the construction which I am putting upon this clause, the whole deed is made consistent; and in construing deeds, it is a most material consideration to make them so, if we can. It is said, that this second clause would be useless according to this construction, because heirs-male are clearly called by the first clause in the dispositive part of the deed. But it may be useless or redundant, according to our notions of the present day, while at the time this deed was written it may not have been considered useless and redundant. There may have been doubts, whether it was not possible, under the destination clause as it originally stood, to bring in a younger son before an elder; and possibly some such doubt may have been in view, as was stated in the case of *Bargany*. But, supposing it to be a useless clause, it is no very uncommon occurrence to find useless clauses in deeds, which often abound with redundant clauses. Various instances of this are to be found in the excerpts from deeds laid before the Court, which it is sufficient to refer to.

Upon the whole, I am of opinion, that the destination in favour of heirs-male is not altered by the subsequent clause inserted in the procuratory of resignation.

Lord Balgray.—This is a deed of entail in a contract of marriage; and in judging of it, we must look to the will and intention of the parties; and if such intention can be discovered, (it matters not in what part of the deed), we are bound to give it effect. After mature consideration of the case, I am come to a different opinion from that which I formerly delivered.

In order to exhaust this case, we must go deeper in our examination of it than has yet been done. We must not only consider the clauses separately, but the relations of those clauses to one another, and the import of the whole deed, as expressing the will of the parties.

It is a general rule, that every dispositive clause is exclusive quoad the donee; that is, it implies disposition to him only. Here the clause is clear; but it is in favour of the donees sub modo. It is a modal clause; and in all such clauses, attention must be given to the nature of their modality. That is to say, when a dispositive clause bears to be with and under reservations, burdens, provisions, faculties, restrictions, irritancies,—the donor must be held to have intended that the property should go to the donees exclusively, under these reservations, burdens, restrictions, &c. When you come to interpret the posterior part of the deed, unless you can bring it under the modifications of the dispositive clause, you can give it no effect.

June 14. 1825.

June 14. 1895. In the present case, the dispositive clause proceeds on a narration of the existing investitures. The estate is then said to be disposed 'under the reservations, burdens, provisions, faculties, 'restrictions, and irritancies after written.' When you come to the posterior clause, therefore, you are to consider whether it falls under the description of reservation, burden, provision, faculty, restriction, or irritancy; and if the clause cannot be brought under any of these, the dispositive clause is not affected, and cannot be touched by it.

It is clear you cannot bring the second clause under the terms, reservation, restriction, burden, or irritancy. The words 'provision,' or 'faculty,' can alone be applicable to the clause. A provision, as affecting a dispositive clause, may be either in the shape of an obligation on the disponent, or as a right to a third party. It is never understood to affect the destination, for it would then become a substitution. Is this second clause, then, embraced by the term 'faculty?' A faculty is a power to do something which is reserved to the disponent, or some other party, and implies some exercise of will. It must always have reference to futurity in its operation; and as far as it is not exercised, the deed is not affected.

Taking all these words together, therefore, unless you can bring the second clause under one of these modifications, you do nothing at all, nothing that can affect the destination in the dispositive clause. Thus far, then, as to an exercise of the first clause.

As to the second clause, 'Provided also, as it hereby is, and 'by the charters, infeftments, and other writs to follow hereupon, 'shall be expressly provided and declared, that the eldest son, 'and the descendants of his body, shall always succeed preferably 'to the younger sons and their descendants; and that the eldest 'female, and her descendants, shall succeed without division, and 'exclude the younger females and their descendants from being 'heirs-portioners,' &c. Considering this clause per se, the term 'descendants' makes the difficulty. In its general and comprehensive meaning, it expresses that personal state, natural or civil, which a person has, by being born of a lawful marriage. It is a relative term, and has either mediate, immediate, or more distant relations. It has relation also either to males or females. Only three interpretations are possible under that second destination in the procuratory of resignation: First, the term 'descendants' may mean heirs-male, but not heirs-female; it may mean them both; or it may mean heirs-female, but not heirs-male. These three are

the only possible designations under the term 'descendants.' June 14. 1825.

One of these senses must be taken as to this second clause: Either the most comprehensive one; and then, what does the clause amount to? It is declaratory of the common law; and the term 'descendants' means heirs-general. If, again, the term be taken in a restrictive sense, the clause would form a provision. The second son would come to have a right of preference which did not otherwise exist in his favour. Under the other meaning of the clause, it also becomes a provision; for, in consequence of it, the eldest heir-female gets a right which she has not by common law, nor by the proviso part of the deed. The clause if narrowed, and not taken in its most comprehensive sense, becomes a provision.

It is of importance to compare the two clauses together. By the first clause the destination is not ambiguous; but it alters the common law. In the second clause, the destination is ambiguous in terms. If taken in one sense, it corresponds with the first clause. Nothing is provided which is not in the first or destination clause. If, in the first member of the second clause, the word 'descendants' is taken in the whole extension, the destination is the same as at common law, and a provision is taken away which was constituted by the first clause. How is it possible to argue upon that clause as a provisionary clause, which does not so much make a provision as take one away? How, again, can the clause be considered as constituting a burden? It would then resolve into—I give my estate to certain sons, &c. under the burden of not giving it to them. As to a faculty, it clearly is not one. Again, when a person makes a reservation, does he exercise it in the same deed? It is neither a reservation of a faculty, nor a constitution of one. In the second clause, no act of will is exercised. A power is neither reserved to the disponent, nor constituted to others, to do any thing. The second clause, for these reasons, cannot be construed as a modification of the first or dispositive clause.

But, while I say this, a difficulty still remains. Although the second clause may not be a modification of the first, yet it still remains a declaration of will; and then there is still the question, Whether there is an intention and declaration of will so expressed as to alter the original destination clause? Taking the term 'descendants' in one sense, we have seen that the destination of the second clause would be coincident with the destination at common law. The destination in the first clause is not contrary to the destination at common law, though not in terms of it.

June 14. 1825.

We must look to the general rules of interpretation as to deeds of this kind, viz. contracts of marriage with deeds of entail. The rule is, that we should look to the whole deed. The intentions of parties can be expressed only in succession; but in looking for their will and meaning, we must look for it as extended and expressed over the whole deed; and if it be found, it must receive effect from us. If the second clause be a restriction upon the first, it must have effect. If it extend the original clause, it must also have effect. According to the principles of law, if you can make out, from the second clause, the will of the parties to be as affirmed by the pursuer, her case is clear. As to explanation of the second clause by the first, it will not bear you out in this case. It is a good general rule, that the first destination clause should explain other subsidiary clauses. When words used in posterior clauses are ambiguous, the dispositive clause is sometimes had recourse to for an explanation. But the strength of the pursuer's case rested here, that such rule will not apply to contracts of marriage. A principal object of the dispositive clause, is to point out the lands conveyed; and the destination clause, it is clear, may be affected by particulars inserted in the procuratory of resignation.

But I fear, after all, we must resort to general principles of law, applicable to the whole circumstances of the case; and I come now to views which have much weight with me. First, The term 'descendants,' used in the second clause, is a universal term, somewhat analogous in its signification to the word 'heirs;' and it has been admitted by the pursuer's Counsel, that there are cases where 'descendants,' by relative parts of deeds, may be restricted to males or females. It is a universal term, capable of explanation according to circumstances. Secondly, It is a rule of interpretation, that a meaning should be put upon every clause of a deed. If the term 'descendants' had no other meaning than that which is favourable for the pursuer, you would have to attend to and enforce that meaning. But it is capable of another meaning; and therefore, though the decision be not in the pursuer's favour, you give effect and explanation to the term. Thirdly, In the case of dubious clauses, it is a rule to interpret them so as to avoid contradiction. If you take the term 'descendants' in its comprehensive meaning, there will be contradiction in the deed; but if you take the term in its limited sense, the first clause will not be contradicted by the clause in the procuratory of resignation. Farther, What appears ambiguous, is sometimes to be explained by what is less so. If you adopt the

June 14. 1825.

pursuer's interpretation of the second clause, and apply it to explain the first clause, you throw an ambiguity upon the first clause, which, of itself, appears clear of all doubt and ambiguity. In fact, you alter the destination from heirs-male to heirs whatsoever. Can you do that? Would that be a fair construction? By taking the term 'descendants' in one sense, a contradiction between the two clauses is evident; but there is no contradiction if 'descendants' be taken in another sense, which is equally applicable to the term. By taking the word in the sense for which I contend, there appears no inconsistency,—nothing which involves insurmountable obstacles to a rational interpretation of the deed.

I confess I find two circumstances weigh strongly with me in this question. One is, the state of the original investitures of this estate; for it is fair to resort to these, even in this question, as there is reference made to them in the deed. They must, therefore, it is to be supposed, have been before the parties, and in their view, when the present deed was framed. It is plain, that were the interpretation of the pursuer to be followed, there would be an alteration of the investiture from heirs-male to heirs whatsoever,—an alteration which it does not seem probable from the deed was intended by the parties. But that circumstance alone would not have been sufficient to influence my opinion, had not my mind been led to what appears to me to be the right rules of interpretation in the present case, and which I have already noticed. There is also a clause which Lord Hermand adverted to, of provision to daughters, which I think would have had no place in the deed, had it been understood that daughters, in the situation of the pursuer, were to succeed to the estate.

Lord Balmuto.—I have no hesitation in saying, I have had no difficulty in forming an opinion on this question. By the first destination contained in the deed, it clearly appears that all parties agreed there should be a male succession. Catherine Ogilvie agreed to give up her daughter's claim to the heirs-male of a second marriage, if there should be no heirs-male of her own marriage. Mr William Grahame married a second time, and had three sons by that marriage. According to the destination, the estate was given first to William Grahame, and the heirs-male to be procreated of the marriage betwixt him and Miss Ogilvie; whom failing, to the heirs-male to be procreated of his body of any after marriage; whom failing, to the heirs-female to be procreated of the marriage with Miss Ogilvie; whom failing, to the heirs-female to be procreated of his

June 14. 1825.

body of any after marriage; whom all failing, to Robert Barclay, &c.

William Grahame's eldest son Robert had one daughter. According to the first destination, failing Robert Grahame, the estate does not go to the pursuer. Miss Grahame, the pursuer, is undoubtedly a descendant of Robert Grahame; and it is contended, that, being so, she excludes, by the clause in the procuratory of resignation, her uncle from the estate. But is it possible to conceive that it was the intention of Miss Ogilvie, when she had allowed her daughters to be passed over in favour of heirs-male of a second marriage, to consent farther, that the daughters of a son of the second marriage should exclude her own daughters? The pursuer is the daughter of a son of the second marriage; and according to the plea which she maintains in the present action, she must exclude the daughters of the first marriage, which is a contradiction of the destination in the first clause. We are called upon to explain this deed, which is expressed in a very confused manner. And considering the whole clauses, and that the estate was formerly vested in heirs-male, I think the defender ought to be assoilzied from the conclusions of the action. Were the pursuer to succeed, in consequence of the term 'descendants' in the clause in the procuratory of resignation, I think the daughters of the first marriage would sustain a great hardship; and the succession take a course against them in a way not contemplated by the framers of the deed under our consideration.

Lord President.—I concur with the whole of your Lordships in thinking, that the interlocutor at present under review should be adhered to. At the same time I may observe, that this is a case in which I have felt considerably perplexed; and I own, that, notwithstanding the original opinion which I formed in favour of the interlocutor, that opinion was at times affected by the arguments of Mr Moncreiff and Mr Clerk. But, after hearing Mr Jeffrey, and turning the matter in my own mind, I adhere to the opinion which I formerly delivered; and I think the defender ought to be assoilzied.

The first thing that must strike us here is, that this is an entail, not made by an unilateral deed, flowing from the mere will and pleasure of the disponent; but is contained in a contract of marriage, where, in so far as intention is to be considered, or to be gathered from doubtful words, you are bound equally to discover the intentions and views of the lady and her friends, as of the husband and his friends. She brought a fortune, which in

those days was considered large; and she and her friends had as good a right to make stipulations as to the succession of the estate, as the gentleman and his friends. The estate, no doubt, was the gentleman's; but it depended upon the lady and her friends to consent to the marriage, according to the reasonableness of the terms proposed as to the succession. June 14. 1825.

The order of succession originally agreed upon in the dispositive clause, cut off the succession as fixed by the common law; but, at the same time, it is a very natural and a very usual destination, and more frequent than any other to be found in entails. An entail upon heirs-male of a marriage, in the terms of the destination in the dispositive clause of this deed, is the most usual destination in entails and contracts of marriage. But, at all events, such undoubtedly is the fact as to the present deed, that it contains a disposition cutting off the female succession. To that destination both parties had consented. But I admit, that it was in the power of the parties, in any after part of the deed, to modify that destination in particular instances. They might have declared, that if the estate should happen to descend to a certain son, he should hold it in fee-simple. That was competent; or any other provision and modification might have been introduced by a subsequent clause.

One thing is plain, that there can be no entail or settlement without a destination of some kind or other in the dispositive clause. Suppose that the destination in the dispositive clause had been blank, and that the provision stood in the procuratory of resignation, neither of the parties would have succeeded to the estate under that provision. It would have gone to heirs of line; or to the Crown, for any thing I know. Though I believe it is now held, that an estate goes to heirs of line, if descendants of no kind are mentioned.

Therefore the original destination here must stand, unless altered by a subsequent clause which is intelligible and precise. A provision appears afterwards; and if it carry the estate to the present claimant, it makes a very important alteration upon the original destination. The second part of the second clause, which occurs in the procuratory of resignation, it is admitted on all hands, does make an important alteration on the destination in the dispositive clause as to female succession. We are all agreed, that the provision in the procuratory of resignation, 'that the eldest female and her descendants shall succeed without division, and exclude the younger females and their descendants from being heirs-portioners,' limits the general des-

June 14. 1825.

tionation to heirs-female in the first clause. The presumption therefore is, that the disposer in like manner meant something by what he inserted in the procuratory of resignation regarding the succession of males. But whether he meant merely to confirm the original destination in the dispositive clause, or intended to make an alteration on it, he does not distinctly say; and that is the question to be determined. He might have inserted in the procuratory of resignation, a destination which, if clearly worded, would have utterly subverted the original destination, and we must have given effect to the destination in the procuratory; and if any person had taken the estate under the first destination, he would have been bound to denude in favour of the heir pointed out by the procuratory of resignation. But the question is, has the disposer said any thing to make us infer that his intention was to alter the original destination? The destination, as governing the general case, it is clear, must stand. How has he limited it? Or, if it be said he has explained it, he has used for the purpose the most ambiguous terms I ever saw employed in my life. He must profess, too, to explain a clause requiring no explanation; for 'heirs-male' are clear terms, and require no explanation. If he professes to limit the original destination, let him take some intelligible and forcible terms for the purpose. The words employed are: 'Provided also, as it here-
' by is, and by the charters, infeftments, and other writs to fol-
' low hereupon, shall be expressly provided and declared, that
' the eldest son, and the descendants of his body, shall always
' succeed preferably to the younger sons and their descendants;
' and that the eldest female and her descendants shall succeed
' without division, and exclude the younger females and their
' descendants from being heirs-portioners.'

There are two interpretations which we are desired to put upon this clause: first, that the word 'descendants' shall be held to mean the descendants as previously pointed out in the destination; the effect of which is only to make this clause perfectly redundant. It won't, however, make the clause contradictory of the original destination. According to the other interpretation, the term 'descendants' is taken in its loosest and most general meaning, including males and females; the effect of which is to introduce an utter inconsistency and contradiction into the deed; and the redundancy still remains as much as in the other sense. There is a destruction of the original clause, and the redundancy is still left; for it is declared in so many words, that younger sons shall not succeed till after elder sons, which is the clear rule of law, under the previous destination. So that there is as much redun-

dancy in the one case as in the other, and the last superadds positive contradiction, and utter destruction of the destination previously agreed on. Some of the constructions contended for by the pursuer, and put by Mr Clerk, involve suppositions so monstrously absurd, that the parties, if they entertained them, could not be deemed capable of entering into a marriage. June 14. 1825.

I take the rule of construction to be, in the case of a mutual contract, to interpret it in the way most likely to have corresponded with the intention of both parties. Now, as to Mr Grahame and old Mr Barclay, they might readily agree to either of the interpretations, because all the descendants, by whatever marriage, were descendants of their bodies. But Miss Ogilvie had different interests, and therefore might naturally have views; and these, in this question, must not be overlooked. She brought what was considered an ample fortune in those days, eighty years ago. She conceded so far to the prejudices of this family, that she allowed heirs-male of a second marriage to be preferred to heirs-female of her own. But nothing could be more natural or reasonable than for her to object to any clause, the effect of which could be supposed to be, to give a preference over her own daughters, in favour of the daughter of a son of her husband by a second marriage.

I cannot therefore give into the interpretation of this deed which would suppose, that a particular destination, in itself highly reasonable and very common, was stipulated in the first part of the deed, and then directly destroyed by the clause in the procuratory of resignation introducing an order of succession unusual in itself, and very unreasonable, in so far as the lady was concerned. This clause may be redundant according to the interpretation I give to it; but mere redundancies are seen every day in deeds; and, even according to the pursuer's interpretation, redundancy still attaches to the deed. Surely, in the interpretation of the deed, we are bound rather to admit redundancy than inconsistency, which I cannot think the parties had in view. And as to the lady, I cannot think she could consent to a clause of the import contended for by the pursuer. Taking into view, therefore, the nature of the deed, and looking at the whole clauses; considering that, as a mutual contract, the intention of both the parties is to be our guide, if it can be discovered; I am of opinion, that we ought to look upon the clause merely as redundant, and not both as redundant and inconsistent. What had put it into the mind of the inserter, we are not bound now to discover or explain. (Here the Lord President

June 14, 1825. noticed several instances of singular provisions as to successions, the wisdom of which appeared to him questionable.)

In deciding questions as to succession under entails, we should never look to considerations of hardship. The only way is to let the destination go according to law. For all the reasons which I have stated, I adhere to the former interlocutor.

The Court (20th June 1816) adhered.

The pursuer appealed.

Before, however, the appeal was heard, she discovered in the public records a bond of provision, executed by William Grahame, in favour of his younger children, and a discharge by Francis (the defender) of his proportion; deeds which to the pursuer seemed of weight in supporting her construction of the contract of marriage. She, therefore, with concurrence of Francis Birmingham, whom she had recently married, prayed the House of Lords to 'grant permission to put in an additional 'case, containing those statements, whether in law or in fact, 'which your petitioners are advised are still requisite on their 'part; and to allow the said additional case to be accompanied by 'such appendix as may be in conformity to the standing orders of 'this most honourable House.' The House refused this motion; and being unable, from the standing order of the House, to found on these documents at the hearing, the appellants being 'most 'anxious to be heard on the import of these deeds, and as they 'cannot be heard unless the cause is remitted back to the Court 'of Session in Scotland,' prayed the House to remit, 'with instruction to hear parties forthwith farther thereupon, with liberty to receive such new allegations and evidence as the occasion may require.' This the House also refused, and ordered the appellants to pay the costs of the day. Then the appellants applied for leave to withdraw the appeal; and the respondent consenting, the appeal was allowed to be withdrawn.

The appellants then petitioned the Court of Session to resume consideration of the cause, which being granted, they obtained a diligence to recover the deeds on which they relied for alteration of the judgments of the Court. Under it, they produced from the public records a bond of provision and discharge; but were unsuccessful in recovering the marriage-contract between William Grahame and Wilhelmina Barclay,—Francis Grahame, the defender, deponing that he had never seen, and knew nothing about it.

June 14. 1825.

The bond of provision bore, that William Grahame, by marriage-contract with Wilhelmina Barclay, had bound and obliged himself, and the heirs-male of the marriage, in the event of there being three or more children of the marriage beside the eldest son, to make payment to the younger children of the sum of L. 3000, to be divided among them; and therefore, in implement of the said contract of marriage, and in virtue of the powers thereby reserved of dividing the same, he bound and obliged himself to content and pay, &c.; ‘ And if it shall please God to remove by death any one of my said four younger children, whether the same shall happen before or after my own decease, without issue lawfully procreate of his or her body, and without uplifting and discharging, or legally assigning, his or her share of the aforesaid sum of L. 3000 hereby appointed to be paid, then and in that case it is hereby expressly provided and declared, that the share of the child dying as said is shall fall, accresce, and belong to, and be equally divided amongst the other three surviving children. And if it shall please God to remove the said Robert Grahame, my eldest son, without male issue lawfully procreate of his body, in which event the succession of my real estate, by the title-deeds thereof, shall devolve upon the said Francis Grahame, my second son; and in case, at the time of the said Francis Grahame his succession to the said estate, he shall not have received payment, or legally conveyed his share of the aforesaid sum of L. 3000; then, and in that event, the said Francis Grahame’s share aforesaid shall fall, accresce, and belong to, and be equally divided amongst the other three surviving younger children.’ The testing clause bears, ‘ the word ‘ male,’ in the eleventh line from the top of the third page, being delete before subscribing.’

After William’s death, letters of inhibition on this bond were raised by Francis, and the other younger children, against their eldest brother Robert; and Francis having received payment of L. 900, his share, granted, on a narrative of the bond of provision, a regular discharge of the amount, ‘ together with the said contract of marriage, bond of provision, letters of inhibition raised thereon,’ &c.

The appellants, in support of their former arguments, maintained, that these deeds proved that Francis was only to succeed on failure of issue of Robert, and that Francis had signified his acquiescence in that state of the titles, by accepting payment of a provision under the bond containing that limitation. The respondent contended, that the application to be heard was incompetent; that deeds on public record were not noviter venientes

June 14. 1825.

ad notitiam, and therefore could not now be founded on; and that, at all events, a bond executed more than twenty years after the marriage-contract directing the succession, could not alter or qualify the original destination, even if the terms of the bond were more precise and unambiguous than they are.

Lord Hermand observed,—The new production is said to import the opinion of the respondent in favour of the petitioners' claim. I do not think that of consequence at all. Even the opinion of the entailer could not enable me to controul the meaning of the words used. Look to the deed itself. The dispositive words are as clear as can be conceived:—(His Lordship then read the clause, see ante, p. 354.)

Is it possible, by any construction, to cast a doubt upon this, that the heir-male of the second marriage is to be preferred to the heir-female of the first? Does the entailer prefer the heir-male of the first marriage to the heir-male of the second? By no means—'whom failing, to and in favour of the 'heirs-male lawfully to be procreated of the said William Grahame of any 'after marriage; whom failing, to the heirs-female to be procreate of the marriage betwixt the said William Grahame and 'Mrs Catherine Ogilvie.' There can be no doubt as to the case.

The procuratory of resignation in the same deed is founded upon by the petitioner. I would not quarrel with the disposition, if the two clauses stood contiguous. I allow the deed to be transposed as the petitioner desires. It is to me incredible that two opposite destinations should be in the same deed. There is one destination as clear as the sun, and another which is consistent with it, and yet it is said to overturn the deed. It is impossible for me to conceive such can be the meaning of the granter, or any man of common sense.

The procuratory is for making effectual the dispositive clause—and am I to be told it is to overturn it?—'And for making 'the saids infeftments in the lands and others before disposed, 'in the respective events before expressed, effectual by resignation,' &c.—Are we to be told, that this subordinate clause is to overturn the clause to which it professes to give effect? Are we to set the clauses a-quarrelling—But they are intelligible and consistent—'Provided also, as it hereby is, and by the charters, infeftments, and other writs to follow hereupon, shall be expressly 'provided and declared, that the eldest son, and the descendants 'of his body, shall always succeed preferably to the younger 'sons and their descendants; and that the eldest female and 'her descendants shall succeed without division, and exclude the

June 14. 1825.

‘younger females and their descendants from being heirs-portioners,’ &c. Did any person ever hear that a male is not a descendant as much as a female? I cannot conceive there is any difficulty in the case. The term ‘descendants’ applies to males as well as females, and should be explained according to the dispositive clause.

I agree with a passage quoted on the 36th page of the petition:—‘But if there be different acknowledgments or declarations by the same person, posteriora derogant prioribus; which holds also in clauses in the same writ; for the posterior clauses, if they agree not with the former, do always qualify, correct, alter, or even take off the former; if they do fully contradict the same, or be inconsistent therewith; for parties, in forming of writs, which oftentimes are very long, are unwilling to alter the whole frame, which takes long time and expenses, and therefore do add posterior clauses, not agreeing with the former.’ Will any one say the two clauses do not agree with each other—that they do fully contradict one another?

On the eighth page of the appendix I read, ‘And that the heirs, both male and female, and the husbands whom the heirs-female shall marry, or to whom they are married at the time of their accession to the said estate, and their heirs, shall be holden obliged, from that time forward, to assume the surname of Grahame, if they were formerly called by another name, and to bear the arms of the family of Grahame of Morphie in all time thereafter; likewise, that it shall not be leisome nor lawful to, nor in the power of the said William Grahame, nor any of the said heirs of taillie and substitution before expressed, to alter, in fringe, innovate, or change the foresaid taillie or order of succession before set down, nor to do any deed, directly or indirectly, whereby the same may be changed.’ What is the succession before set down? Is it not that pointed out by the dispositive clause? That in the procuratory not only does not overturn, but confirms the terms of the dispositive clause.

Lord Balgray.—I am of the same opinion as to this case.

Lord Balmuto.—There are two questions here. Are the petitioners entitled to found upon the deeds they point at, as *res noviter veniens ad notitiam*? If they ought to be admitted, are we to allow this new diligence to be granted? I think they are not entitled to found on the deeds as *res noviter*—nor are they entitled to a new diligence.

This is a male destination, and I think the petitioners’ claim unfounded.

June 14. 1825.

Lord Succoth.—I have some doubt whether the parties, the petitioners, have made out the plea of *res noviter veniens ad notitiam*—for this deed of provision seems to have been upon record; and the presumption in law is, that they might have known any deeds in the public record.

But I am, at any rate, of the same opinion with all of you who have spoken, that this deed is not of such importance as to make us alter our former opinion.

We formerly went over the grounds of the question fully; and although I have full notes upon the subject, I do not think it necessary to go over the grounds upon which I am of opinion, that the leading clause of the destination of this entail is not to be controlled by the after clause that is to be found in a subsequent part of the deed, in which the word ‘descendants’ is used, which, by the argument of one party, is said to qualify or alter the original clause altogether. I could never go into that construction, if the subsequent clause could be any way reconciled to the leading clause. ‘Descendants’ is a flexible term, which may mean either male or female descendants, and if so, you must construe it so as to make it mean the descendant mentioned in the leading or prior clause. In the other way, you make it a very extraordinary deed.

As to the question, whether the present bond of provision is of such importance as to induce us to alter the construction we have put upon the entail, I agree with your Lordships that it is not so—that, in the first place, it is not a deed executed by the proper parties to this entail. Though it may be a bond of provision, executed twenty-four years afterwards by the son of the maker of the entail, and although it may shew his construction of the clause in question, that is not a circumstance of sufficient weight to induce you to adopt the construction, which you would otherwise think was not the proper construction of the destination of the entail.

That being the case, I do not care whether this is *res noviter veniens ad notitiam* or not. Admitting this, I think our former judgment was right.

Lord President.—I am of the same opinion. Were the proposed production received, I cannot see what effect it could have. The important clause of the destination is not to be controlled by such expressions in a subsequent clause, or by such subsequent interpretation.

Mr Clerk.—Are we to understand your Lordships to decide upon the merits?

Lord President.—Upon both points.

The Court, 29th May 1821, accordingly repelled 'the objection stated to the competency of the application, and find, that the two deeds founded on by the petitioners cannot be received, as not being properly noviter veniens ad notitiam; but although the same were receivable, and had been received, find, that they cannot have any effect on the merits of the question at issue; and therefore they refuse the desire of the said petition, and adhere to the interlocutor reclaimed against.'*

June 14. 1825.

The pursuer and her husband again appealed.

Appellants.—1. The objection that these deeds cannot be received, as not coming within the rule of noviter veniens, is unfounded. 2. The pursuer is called by the deed before the respondent. The object of the parties to the marriage-contract was, to make a provision in the first place for William Grahame and his issue; and this is apparent from the scheme and structure of the deed, from the express proviso in the procuratory of resignation, and by the bond executed under the power of providing for younger children. A limitation to the heirs-male of the body in the dispositive clause may, by words in the after part of the deed, be extended to heirs-general of the body; and the contrary principle, that a specific clause cannot be altered by a general clause, is unknown to law. Many examples occur of the procuratory of resignation having the effect of subverting or changing the destination in the dispositive clause. In the present case, the procuratory of resignation unquestionably rules the dispositive clause, in so far as it excludes heirs-portioners; and it also rules that clause, by letting in Robert's daughter, as his 'descendant,' before the brother Francis. To say that the word 'descendants' means 'males' only, leads to manifest inconsistencies; for, throughout the clause, it elsewhere includes females as well as males: and the power given by the deed to the heirs of tailie to provide portions for their younger children, is in direct opposition to the reading which would deprive the son in possession of providing for a daughter, if his only child. But, in point of fact, the respondent has claimed and received a portion as a younger child, under a bond which declares that he should not succeed to the estate in question, till a failure of the issue of Robert Grahame, the pursuer's father.

Respondent.—1. To obtain admission for instrumenta noviter

* 1. Shaw and Ballantine, No. 39.

June 14. 1835. reperta, the party producing them must not only have been ignorant of their existence, but must not have had in his power to know of it. But here the deeds now founded on were on the public record, and as much accessible before insisting in the suit, as after final judgment. The appellants are therefore barred from availing themselves of the rule *res noviter veniens*, for the 'noviter' is wanting. 2. The appellants reach their conclusion by a breach of all recognized rules of construction. The meaning of the term 'heir-male of the marriage' is clear and inflexible, and cannot be so qualified as to mean heir-female of the marriage. But what is held to qualify it? The word 'descendant.' Now, nothing can be plainer than that this word is a flexible term, and must yield to the inflexible. It signifies male and female descendants in the order previously pointed out in the destination clause. A special term cannot be qualified by a general expression. If the reading of the appellants were adopted, the most distinct clause is made inoperative; an effect never permitted, unless every other construction of the alleged qualifying clause fails. The deeds now produced, even if they could in point of form be received, do not strengthen the appellants' case; for the declaration said to be imported by the bond of provision, is not by the maker of the deed, but by a different person, who might have mistaken the meaning of the contract, or might have had some mala fide object in view, and been endeavouring to create evidence to thwart or contradict the true intentions of the entailer. But the terms of the bond are not conclusive; and in dubio, such a construction should be put upon a deed, as may be most favourable to the heir of the former investiture.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

Appellants' Authorities.—3. Stair, 4. 33.; 2. Craig, 17. 11.; Johnston, December 15. 1681; 1. Ersk. 1. 50.; 35. Voet, 4. 4.; Durie, Feb. 28. 1667, (16,927.); 4. Stair, 46. 21.

Respondents' Authorities.—Dundas, March 9. 1810, (F. C.); 4. Stair, 46. 21.; 3. Ersk. 8. 47.; Rowan, Nov. 22. 1775, (11,371.); Johnston, June 10. 1710, (11,351.); Kerr, Nov. 18. 1810, (F. C.); 3. Stair, 5. 12.; 2. Bridgeman, 285.

M'DOUGALS and CALLENDER—THOMAS,—Solicitors.

EARL of WINCHELSEA, and Others, Trustees of LADY ESSEX No. 39.
KER, Appellants.

Honourable HENRIETTA BELLENDEN, and Others, Respondents.

Service—Competition.—The proprietor of certain lands having disposed them to a trustee for purposes expressed in a relative deed of instructions; and his two heirs-portioners A and B having, on his death, granted a trust-bond, on which an adjudication was led, and which was thereafter assigned to these heirs; and they having got a decree, reducing the deed of instructions, and ordaining the trustee to convey to them; and he having disposed to them, with procuratory and precept, on the latter of which they were infest; and one of them, A, having died, and the other, B, having obtained a general service as heir of A, and exped a charter of resignation and confirmation on the procuratory, and been infest; and B having died, after executing a deed of settlement in favour of trustees, conveying all her rights, and binding herself and her heir to give them an effectual title; and her trustees having thereupon obtained a charter of adjudication, and been infest; and the heirs-portioners of line, both of A and B, having exped a special service to B, and obtained themselves infest in the superiority of the whole subjects; and thereupon granted to themselves a precept of clare constat as heirs of A, and been infest;—Held, in a competition, (amending the judgment of the Court of Session), 1. That the general service and charter of resignation could only vest in B the superiority of her own and A's share of the lands; and therefore, as A remained vested in the fee of the dominium utile of her share, her heirs were preferable to the trustees of B; and, 2. That although B's general service conveyed to her A's personal right to the adjudication, yet as B had not made up titles to A's share of the lands, the charter of adjudication exped by B's trustees could not exclude the heir of A.

LADIES ESSEX and MARY KER were the sisters of John Duke of Roxburghe, who, besides the estate of Roxburghe, possessed various lands, some of which were destined to his heirs of line, and others to the heirs of the entailed estate. On the 5th November 1803, his Grace executed a trust-disposition and deed of settlement, by which he disposed ' to John Wauchope and James Dundas, clerks to the signet, and to any other person or persons whom ' I shall hereafter name and appoint by a writing under my hand, ' or who shall be assumed in virtue of the powers after-written, ' as trustees for executing the trust hereby created, and to the ' survivors or survivor of the said trustees named or to be named ' by me, or who shall be assumed as said is, and who shall ' accept hereof, &c. all and sundry lands and heritages, &c. ' whether in England or Scotland, presently belonging or which ' shall happen to belong to me at my decease, free and unlimited ' by any entail, and at my absolute gift and disposal, by disposi-

June 17. 1825.

1st DIVISION.
Lord Meadowbank.

June 17. 1825. 'tion, adjudication,' &c. After providing for the payment of debts and legacies, he appointed his trustees to dispose of the residue, 'in favour of such person or persons, or for such uses and purposes, as I have directed or shall direct, by any deed, missive, memorandum, or other writing executed or to be executed by me for that effect, at any time of my life, and even on deathbed,' &c. On the 19th March 1804, the Duke executed a deed of instructions, by which, after appointing his trustees to pay certain legacies, he directed them 'to invest the whole residue and remainder of my funds in the public funds, or upon real security in Scotland, the dividends or interests whereof they are to pay over yearly to the said Lady Essex Ker and Lady Mary Ker, equally between them, and, failing either of them, to the survivor, during their lives, or that of the survivor; and upon the death of the survivor, I then appoint my trustees to pay over the residue and remainder of my fortune to the persons, and by the proportions after mentioned, viz. to the Reverend Charles Baillie, second son of the late Mr George Baillie of Mellerstone, one-half of the said free residue; to Sir John Scott of Ancrum, Baronet, one-fourth thereof; and to Sir Henry Hay Macdougall of Mackerston, Baronet, the other fourth part thereof.' His Grace was at this time on deathbed, and accordingly he died on the following day. Ladies Essex and Mary Ker, being desirous to set aside this disposition of the property destined to them, executed on the 19th June thereafter a trust-bond for L. 100,000 in favour of the Earl of Winchelsea, with the view of making up titles by adjudication. On the 9th of August his Lordship raised and executed letters of special and general charge against the ladies, charging them to enter themselves heirs-portioners of line and of provision in special and in general to their brother. At the same time they brought an action of reduction against the Duke's trustees of the deed of instructions, on the head of deathbed; and, founding on the trust-deed, they concluded that the trustees should be prohibited from selling the lands, and 'that they should be ordained to divest themselves of the lands in favour of the pursuers, Ladies Essex and Mary Ker.' Mr Wauchope had alone accepted, and on the 22d and 23d of April 1805, he took infeftment on the trust-deed, which was recorded on the 6th of May. On the 17th of that month decree of adjudication was pronounced, in virtue of the trust-bond in favour of Lord Winchelsea, and on the 14th June the abbreviate was recorded.

In the mean while, the litigation had been going on in the ac-

tion by the Ladies Ker, in which the Court, on the 8th of July 1806, pronounced this judgment:—‘ The Lords reduce, decern, and declare, in terms of the pursuers’ libel, in so far as relates to the whole heritable subjects conveyed by the trust-deed, dated the 5th day of November 1803, and descendible to the pursuers as heirs *alioqui successuræ* under the titles thereof, which stood in the person of John Duke of Roxburghe, exclusive of the mortis causa settlements executed by his Grace, and decern and declare accordingly; but in so far as regards the heritable property conveyed by the said trust-deed, and descendible to the Duke’s heirs-male by the titles thereof, remit to the Lord Ordinary to hear parties’ procurators, and to proceed otherwise in the cause as to his Lordship may seem proper.’ Both parties having reclaimed, the Court, on the 26th November, adhered; but ‘ remitted to the Lord Ordinary to hear parties farther upon the declaratory conclusions of the libel, and other prayers of the petition; and to proceed and determine therein as to his Lordship shall seem proper.’ An appeal having been taken against these interlocutors, they were affirmed by the House of Lords in February 1812. On the 3d of July thereafter, the Ladies Ker obtained from Lord Winchelsea a conveyance of the adjudication on the trust-bond, and to the lands therein contained: but during their lives nothing farther was done upon it.

On the return of the case to the Court of Session, the Lord Ordinary appointed Mr Wauchope, the Duke’s trustee, to state in a condescendence, first, The lands which were held under destinations exclusive of the rights of the pursuers, as heirs of line: secondly, The lands in the parish of Kelso, which, according to the view of Mr Wauchope, were so affected by a power of purchase in favour of the heirs of entail, as to bar the rights of the Ladies Ker as heirs of the investiture: and, thirdly, ‘ The lands that are admitted to belong to the pursuers, under the final interlocutors of this Court and the House of Lords, and which the defender contends he is entitled to keep possession and management of, as trustee for the said John Duke of Roxburghe, until certain annuities are expired; what the rental of these lands are, and the extent of annuities or burdens thereon; and what objections he has to dispoise and convey these to the pursuers, the legal heirs, under the burden of what may affect these lands, or whether any of them attach upon, or have been paid out of the arrears of rent, or other property left by the said

June 17. 1825. 'John Duke of Roxburghe.' This order having been obeyed, the Court, on 20th November and 13th December 1813, 'decerned and declared, that the defenders were bound to execute, 'quam primum, in favour of the pursuers, the said Ladies Essex and Mary Ker, proper conveyances of the whole lands in article 'third of said condescendence; and decerned and ordained the 'defenders to execute the aforesaid conveyances in favour of the 'pursuers, the said Ladies Essex and Mary Ker, accordingly.' Accordingly, on the 11th January 1815, Mr Wauchope executed a disposition in favour of the ladies, containing an obligation to infest either a me vel de me, and procuratory and precept, on the latter of which infestment was taken on the 3d and 4th of March, and the sasine recorded on the 30th of the same month. Under this title they borrowed sums of money, and particularly L.6000 on the 30th December 1817, for which they granted an heritable bond, on which infestment followed. Thereafter, Lady Mary died intestate, and her sister Lady Essex thereupon obtained a general service as her heir. She then expede a Crown charter of resignation and confirmation, proceeding on the procuratory granted by Mr Wauchope, and which contained also a confirmation of the trust-deed and sasine in favour of that gentleman. Upon the precept in that charter Lady Essex was infest, on 17th December 1818, and her sasine duly recorded. In March 1819 she granted a trust-disposition in favour of the appellants, of 'all and sundry lands and heritages whatsoever, 'belonging to me, or to which I shall or may have right, situated 'or being in that part of Great Britain called Scotland, with the 'whole parts and pertinents thereof, and all my right and title to, 'and interest in the same, and the rents thereof; hereby binding 'and obliging me and my heirs to make up complete titles to the 'said lands and heritages, if necessary, and to convey the same in 'all form to the persons above mentioned, and their foresaids, 'for the purpose herein after mentioned.' In the month of August following she executed a relative testament; and the effect of the two deeds was to exclude from her succession her heirs-at-law. She died soon thereafter; and her trustees, the appellants, thereupon charged the respondents, the Honourable Henrietta Bellenden, John Bellenden Ker, and John Bulteel, (who were the heirs-portioners of the two ladies), to enter heirs in special to Lady Essex, and raised an action of constitution against them, concluding that they should be ordained to make up titles to the whole estates which had been vested in the ladies, and convey the same to the trustees of Lady Essex. In February

1821 these trustees obtained a charter of adjudication, proceeding on the decree of adjudication in virtue of the trust-bond, on which they were infeft on the 7th March. The respondents then brought an action of exhibition of the titles *ad deliberandum*, on which, having recovered the titles, they got themselves served on 30th April 1821, 'as heirs-portioners of line' of the deceased Lady Essex Ker, upon the retour of which a precept from Chancery was directed, by virtue of which they were infeft on the 10th May. On the assumption that they were thus vested in the superiority of the lands, they granted a precept of *clare constat* for infefting themselves as heirs-portioners of line of Lady Mary in the dominium utile of that half, and were infeft on the 19th June. A question then arose, whether they or the trustees of Lady Essex Ker had right to the pro indiviso half of the dominium utile which had belonged to Lady Mary; or whether their title to it was not either vested in the trustees of Lady Essex, or if not, whether the respondents, by serving heirs to Lady Essex, were not under an obligation to convey to them that property. On the part of the respondents it was alleged, that as Lady Mary had been feudally vested, in virtue of the sasine taken on the precept granted by Mr Wauchope, and as Lady Essex had merely obtained a general service to her, it could not have the effect to take the feudal right out of Lady Mary: that although, no doubt, Lady Essex had executed the procuratory in Mr Wauchope's disposition, and expedite a charter of resignation and confirmation, yet this could only vest in her the *superiority*, and not the dominium utile; and therefore, as they had taken up the superiority by means of their service, and obtained themselves infeft upon the precept of *clare*, their right to the Lady Mary's half of the dominium utile had been effectually vested in them. On the other hand, the trustees maintained, that as the ladies had two titles, viz. the adjudication and the disposition from Mr Wauchope, they must be held as possessing on both of these titles: that by the general service of Lady Essex, she had acquired the personal right in the adjudication belonging to Lady Mary, which right she had transmitted to them by her trust-deed, and therefore the charter of adjudication, and infeftment in their favour, gave them a preferable right to the respondents: that, at all events, as the respondents, by serving heirs to Lady Essex, represented her, and as she by her trust-deed had bound herself and her heirs to give an effectual title to all the subjects to which she had right, and as by the general service she had acquired the personal right under the adjudication belonging to Lady Mary, the

June 17. 1825.

June 17, 1825. respondents were bound to convey the subjects to the appellants. To try this question, a multiplepinding was brought in name of the tenants of the whole subjects, and the case having been reported upon informations by Lord Meadowbank,---

Lord Hermand observed,---This is a case in *spicibus juris*. Law is a deep well, and although I have been engaged in the study and practice of it for so many years, yet I have not got to the bottom of it. This is a question of infinite importance in conveyancing, and involves so much difficulty, that, if I could with propriety avoid giving an opinion, I would do so; but I cannot. The Ladies Ker began by making up their titles by means of a trust-bond. It is true that there was a disposition by Mr Wauchope to them. But he was a mere trustee of the Duke of Roxburghe, in whom the substantial right remained vested. On the indefinite precept sasine was taken, which, as a public infeftment, was null until confirmed. On the death of Lady Mary, it is true that her sister got a general service, which, no doubt, could not transmit a feudal right, but it had the effect to transfer the personal right under the adjudication. On this Lady Essex unquestionably could have expedite a charter of adjudication, which it is not disputed would have vested in her Lady Mary's share. It is said, however, that she is dead. This, however, is of no importance to the question, because she lives in the persons of her trustees, who obtained a charter of adjudication and infeftment prior to the titles made up by the respondents. Besides, the respondents are liable, as the representatives of Lady Essex, to denude in favour of her trustees.

Lord Balgray.---I am of a different opinion. Observe the situation in which Lady Mary's title stood. By the adjudication she had a personal right to the lands. By Mr Wauchope's disposition, with procuratory and precept, she could make up titles so as to create either a public or a base right. She resorted to the latter. Sasine was taken upon the precept, and consequently she was feudally vested in the fee of the dominium utile. Now it is an undoubted rule of feudal law, that unless proper means are adopted to take an infeftment out of a person who has been feudally vested, the property will remain in *hereditate jacente*. But what did Lady Essex Ker do? She got a general service, which it will not be pretended could take the feudal fee out of Lady Mary. It no doubt conveyed to her Lady Mary's right to the procuratory, and to the adjudication; and in virtue of the procuratory she might have resigned *ad remanentiam* in her own hands, or expedite a charter on the adjudication, and got

herself infest; but she neither did the one nor the other. The question therefore is, where was the feudal fee when Lady Essex died? was it in her, or in hæreditate jacente of Lady Mary? If in Lady Essex, then it belongs to her trustees. If not, then it remained in hæreditate jacente of Lady Mary, and belongs to her heirs. Now it is impossible to hold that the fee was transmitted to Lady Essex, because the general service could not have that effect. If so, then it remains in hæreditate jacente of Lady Mary, and consequently, as the respondents are her heirs, they are preferable to the trustees of Lady Essex. There is no doubt some difficulty, from the respondents having served heirs to Lady Essex. But as that was for a particular purpose, I think the service might be reduced, and that a reduction is necessary. I may also observe, that I do not concur in Mr Robert Bell's doctrine founded on by the trustees.

Lord Gillies.—I think Mr Bell's doctrine is satisfactorily answered in the respondents' information. On the first part of the case I have no difficulty. There were two separate estates created, in one of which Lady Mary was infest, and Lady Essex in the other. My difficulty chiefly is, as to whether an adjudication in implement might not be led against the respondents. In regard to the first part of the case, the ladies had two different titles to the estate; one founded on the adjudication, and the other on the disposition from Mr Wauchope. On the adjudication nothing followed; but on the disposition infestment was taken. Lady Mary died, and Lady Essex obtained a general service to her. This, no doubt, carried the personal right to the adjudication and to the procuratory in Mr Wauchope's disposition; but it could not take the feudal fee out of Lady Mary, and therefore it remains in hæreditate jacente of her. Lady Essex then grants a disposition to trustees; but as the fee remained in hæreditate jacente of Lady Mary, Lady Essex could have no title to convey it to them. It is said, however, that she conveyed the personal right under the adjudication; and there can be no doubt that, if she had thought fit, she might have made up a good title under the adjudication; but she did not do so, and her trustees have no right except through her; so that if she had no right vested in her, it is impossible that her trustees can have any. There is, however, some difficulty arising from the respondents' service; but this may be obviated in the way suggested by Lord Balgray.

Lords President and Succoth concurred.

The Court, therefore, on the 17th January 1823, 'preferred

June 17. 1825.

June 17. 1823. ' the heirs of line of the deceased Lady Mary Ker to the fund in
' medio, and remitted to the Lord Ordinary to proceed accord-
' ingly.' And to this judgment they adhered on the 6th June
thereafter, on advising a petition and answers.*

Lady Essex Ker's trustees appealed, and, besides repeating their argument in the Court of Session, they contended, that the interlocutor was plainly erroneous, in so far as it preferred the respondents to the whole fund in medio, seeing that it consisted of the rents not only of Lady Mary's share, but of those of Lady Essex. This being admitted by the respondents to be an error, the House of Lords ' ordered and adjudged, that the interlocutor ' of the 17th of January 1823, complained of, be altered, by adding after the words "in medio" these words, "so far as the ' same is constituted of the rents arising from Lady Mary Ker's ' pro indiviso half of the lands conveyed to her and Lady Essex ' Ker by Mr Wauchope's disposition :'" And it is further ordered ' and adjudged, that with this alteration the said interlocutor, and ' the interlocutor of 6th June 1823, also complained of, be affirmed: And it is further ordered, that the cause be remitted back ' to the Court of Session to do therein as shall be consistent with ' this judgment, and as shall be just.'

LORD GIFFORD.—My Lords, I will beg to call your Lordships' attention to a case, in which the Earl of Winchelsea and Nottingham, and Sir Robert William Vaughan, Bart. the trustees of Lady Essex Ker, deceased, who was the daughter of Robert Duke of Roxburghe, are appellants; and the Honourable Henrietta Bellenden, John Bellenden Ker, and John Bulteel, Esq. heirs-portioners of line of the deceased Lady Essex Ker, and of the deceased Lady Mary Ker, are the respondents.

My Lords,—The judgments appealed from to your Lordships' House, were pronounced in a competition for the rents of certain lands, which formerly belonged to Lady Mary Ker, against the appellants, the Earl of Winchelsea and Sir Robert William Vaughan, who were the trustees of the deceased Lady Essex Ker, who was possessed of these lands;—the respondents claiming to have a moiety as heirs-portioners of Lady Mary Ker, and the appellants claiming them as trustees of her sister.

My Lords,—It will be necessary for me to state to your Lordships the facts of this case, and the proceedings which have taken place.

* See 2. Shaw and Dunlop, No. 351.

June 17. 1825.

It appears that John Duke of Roxburghe, the brother of Ladies Essex and Mary Ker, possessed at his death various lands, which were at his own disposal, besides the estate of Roxburghe, which he held under a strict entail. Some of those lands were destined by him to his heirs of line, and others amongst the heirs of the entailed estate. In the year 1790 he executed a settlement in favour of his sisters, Ladies Essex and Mary Ker, disposing to them his whole disposable property, heritable and moveable, but under certain conditions, and the burden of all legacies and bequests which he had left or might leave to any person or persons, by any codicil, letter, or other writing whatsoever under his hand, expressive of his will and intention, even though executed on deathbed. In November 1803 he superseded that settlement by a trust-deed, comprehending his whole estate, heritable and moveable, not limited by entail, to be divided according to directions to be afterwards given by him; and by that trust-deed he disposed and conveyed to John Wauchope and James Dundas, clerks to the signet, and to any other person or persons whom he should thereafter name and appoint by a writing under his hand, or who should be assumed in virtue of the powers after-written, as trustees for executing the trust thereby created, and to the survivors or survivor of the trustees named or to be named by him, or who should be assumed as said is, and who should accept thereof, all and sundry lands and heritages, &c. whether in England or Scotland, previously belonging to, or which should happen to belong to him at his decease.

My Lords,—The deed then enumerated the various heritable subjects conveyed, and declared the purposes of the trust; which were, first, The payment of deathbed and funeral expenses: Secondly, The payment of his debts: Thirdly, The payment of legacies granted, or to be granted by the disponent: and then, with respect to the residue, he directed, that the whole residue, remainder, and surplus of his estate and effects, should be conveyed and made over, or applied and employed by his trustees or trustee acting for the time, to and in favour of such person or persons, or for such uses and purposes as he had directed, or should direct, by any deed, missive, memorandum, or other writing, executed, or to be executed by him for that effect, at any time of his life, and even on deathbed.

My Lords,—On the 19th of March 1804 the Duke executed a deed of instructions, as it is termed, by which he directed and appointed the trustees to pay various legacies, and, after payment of those legacies, to invest the whole residue and remainder of his funds in the public funds, or upon real security in Scotland, the dividends or interests whereof they were to pay over yearly to Lady Essex Ker and Lady Mary Ker, equally between them; and failing either of them, to the survivor during their lives, or that of the survivor; and, upon the death of the survivor, he then appointed his trustees to pay over

June 17. 1825. the residue and remainder of his fortune to the persons and by the proportions thereafter mentioned.

My Lords,—The Duke died on the following day, after executing that deed of instructions; and after his death, the Ladies Essex and Mary Ker challenged this deed upon two grounds; first, Incapacity, from illness, to execute any available deed; and, secondly, Deathbed, in so far as the deed of instructions affected heritage of which they were the nearest heirs.

My Lords,—A short time after his death, in August 1804, the Ladies Ker, with a view of completing their title, granted a trust-bond in favour of Lord Winchelsea, for the sum of L.100,000, upon which letters of general and special charge at his instance were raised and executed against them, as heirs-portioners to John Duke of Roxburghe, their brother, and decret of adjudication was obtained by the trustee, on the 17th of May 1805, of the whole unentailed lands belonging to the Duke.

My Lords,—I shall at present content myself with stating the facts, without making any comment on this proceeding, or others which afterwards took place. I will first of all state to your Lordships the facts and the proceedings of the Court of Session, and afterwards state to your Lordships the observations I have to make on the case. It appears that, previous to this decret of adjudication, namely, on the 22d and 23d April 1805, Mr Wauchope, who, as your Lordships will recollect, was a trustee of John Duke of Roxburghe, had taken infirmity on the trust-deed. As I have stated to your Lordships, the Ladies Ker chose to challenge the deathbed disposition of John Duke of Roxburghe. The summons which they raised upon that occasion concluded for reduction only of the deed of instructions executed by the Duke of Roxburghe, leaving the trust-deed wholly unchallenged, recognizing it, on the contrary, as a valid title in the person of the trustees, and demanding, by the declaratory conclusions of the summons, that not only the deed of instructions should be reduced, but that the trustees should be prohibited from selling the lands, and that they should be ordained to divest themselves in favour of the pursuers, Ladies Essex and Mary Ker.

My Lords,—After a long litigation the Ladies Ker were unsuccessful in reducing on the head of incapacity, but they succeeded in reducing the deed of instructions on the head of deathbed. Upon this occasion the Court of Session pronounced the following interlocutor. (Here his Lordship read the interlocutor.)

Upon a reclaiming petition by the trustee and legatees, this judgment, so far as regarded the reductive conclusions of the libel, was adhered to, but the Court remitted to the Lord Ordinary to hear parties further upon the declaratory conclusions of the libel, and other prayers of the petition, and to proceed and determine therein as to his Lordship should seem proper. My Lords, there was an appeal to your

Lordships' House from that decision, and your Lordships affirmed the interlocutors in the month of February 1812. June 17. 1825.

My Lords,—Shortly after that judgment of affirmance, namely, on the 2d July 1812, Ladies Essex and Mary Ker took from my Lord Winchelsea, the then trustee, who, as your Lordships will recollect, before that time raised an action and got a decree of adjudication on the trust-bond for L.100,000, and obtained from him a conveyance of the adjudication and of all the lands contained in that adjudication, being in ordinary form, to them, their heirs and assignees.

My Lords,—In consequence of the affirmance of the judgment in the House of Lords, the case went back to the Lord Ordinary to inquire into the precise lands of which the acting trustee, Mr Wauchope, was bound, under the declaratory conclusions, to denude; and the Lord Ordinary pronounced an interlocutor, in which he appointed Mr Wauchope to state in a condescendence, first, The lands which were held under destinations exclusive of the rights of the pursuers as heirs of line; secondly, The lands in the parish of Kelso, which, according to the view of Mr Wauchope, were so affected by a power of purchase in favour of the heirs of entail, as to bar the rights of the Ladies Ker as heirs of the investiture; and, thirdly, according to the terms of it, 'The lands that were admitted to belong to the pursuers under the final interlocutors of that Court and of the House of Lords, and which the defender contends he is entitled to keep possession and management of, as trustee for the said John Duke of Roxburghe, until certain annuities are expired: what the rental of these lands are, and the extent of annuities or burdens thereon, and what objections he has to dispose and convey these to the pursuers, the legal heirs, under the burden of what may affect these lands, or whether any of them attach upon, or have been paid out of the arrears of rent, or other property left by the said John Duke of Roxburghe.' My Lords, this explanation having been given in a condescendence, the Court, on the 20th November and the 18th December 1813, decerned and declared, that 'the defenders were bound to execute, *quum primum*, in favour of the pursuers, the said Ladies Essex and Mary Ker, proper conveyances of the whole lands in article third of said condescendence; and decerned and ordained the said defenders to execute the aforesaid conveyances in favour of the pursuers, the said Ladies Essex and Mary Ker, accordingly.' In compliance with that interlocutor, Mr Wauchope, the trustee, on the 11th January 1815, executed a disposition in favour of the Ladies Essex and Mary Ker, of the particular articles contained in the third article of the condescendence. The deed, after stating the proceedings, went on as follows:—'In pursuance of and in obedience to the decree before recited, it is incumbent on me, as trustee foresaid, to convey the foresaid lands and other heritages, in so far as the same are specially contained in the foresaid trust-disposition, all as more particularly after expressed, under the conditions above specified, to and in favour of the said Ladies Essex

June 17. 1825. 'and Mary Ker, in manner under-written; therefore, wit ye me, the
'said John Wauchope, as sole accepting trustee of the said John Duke
'of Roxburghe, in pursuance and in implement of the foresaid de-
'cree, to have given, granted, and disposed, to and in favour of
'the said Ladies Essex and Mary Ker, and their heirs whomsoever,
'and assignees, heritably and irredeemably, all and whole these two
'quarters of the lands and barony,' &c. This disposition con-
tained procuratory and precept; and in virtue of the precept the
Ladies Essex and Mary Ker were infest, and their infestment duly
recorded.

My Lords,—Upon the title so made up, the Ladies Ker continued
to possess during their respective lives. Lady Mary Ker, who then held
a right to the pro indiviso half of these lands contained in Mr Wauch-
ope's conveyance, completed by infestment, died without executing
any settlement, leaving her sister, Lady Essex, her surviving. Upon
the death of Lady Mary, Lady Essex, on the 25th of March 1818, was
served heir in general to her; and it appears that, in the following month
of April, she expedie a charter of resignation on the procuratory con-
tained in the disposition by Mr Wauchope, and her own general ser-
vice as heir to her sister Lady Mary, in virtue of which last she had
right to Lady Mary's interest in the procuratory. This charter also
included a confirmation of the trust-deed in favour of Mr Wauchope,
and of his infestment under it, and upon this charter Lady Essex was
infest. My Lords, under these circumstances, Lady Essex, in the
month of March 1819, executed a trust conveyance to the Right Ho-
nourable George Earl of Winchelsea and Sir Robert William Vaughan,
the appellants in this case, by which she made over to them all her
effects, heritable and moveable, and among others, all and sundry lands
and heritages whatever belonging to her, or to which she had or might
have right, situated or being in that part of Great Britain called Scot-
land. The purposes of the trust were to sell the truster's lands and
estates to pay the debts, the residue being disposed of in the following
terms: 'And then,' according to the terms of it, 'to pay over the resi-
'due and remainder of the proceeds, to and for the use of any person
'or persons I shall name by any writing under my hand, or for such
'purposes as I may direct by such writing; and in default of my mak-
'ing such writing, or giving directions in writing, then to pay over the
'said residue to and among my next of kindred, according to the law
'of England or statute of distribution.'

My Lords,—Her Ladyship afterwards, on the 20th of August in the
same year, executed a will, desiring that her whole lands and property
might be sold, and the proceeds applied in the manner there described
in the payment of various legacies, and appointing Lord Winchelsea
and Sir Robert Vaughan her executors. My Lords, Lady Essex died
a very short time after the execution of this will. The trustees, probably
under the impression that the whole lands, property and superiority,
had been vested in Lady Essex, proceeded to charge the respondents,

the heirs-portioners, to enter heirs in special to Lady Essex; and upon these charges they brought an action of constitution against the respondents, concluding, that they should be ordained to make up titles to the estates without exception, and convey the same to the trustees. That action does not appear to have been proceeded in. The respondents, however, proceeded to make up their own titles. In the first place, they were served heirs-portioners of line in special of Lady Essex Ker, and were on the 13th April 1821 infeft; and being thus vested in the superiority of the pro indiviso half belonging to Lady Mary, on the 10th of May in the same year they granted precept of clare constat for infefting themselves as heirs-portioners of line of Lady Mary Ker in her pro indiviso half, and upon the 19th June they were infeft. June 17. 1825.

My Lords,—After thus assuming that Lady Mary's right under the adjudication, to which I have referred, was vested in Lady Essex by her general service as heir to her sister, and carried by her trust-disposition to them, the appellants obtained a charter of adjudication in favour of themselves, and were infeft.

In consequence of all these proceedings, a competition arose between these trustees and the heirs of Lady Mary as to the rights to the rents of the pro indiviso half of the lands which belonged to Lady Mary Ker; in consequence of which an action of multiplepoinding was raised by the tenants, in order to have it ascertained by the Court which title conferred the substantial right to the property. That action came before my Lord Gillies as Ordinary, who, upon hearing the case argued, was pleased to order memorials. His Lordship being removed to another situation in the Court, Lord Meadowbank, to whom the case was remitted, pronounced the following interlocutor: 'The Lord Ordinary having considered the memorials for the parties in this case, makes avizandum to the Lords of the First Division, and appoints parties' procurators to prepare informations, to be printed and boxed forthwith.' Informations were accordingly given in, and the following interlocutor was pronounced by the First Division of the Court of Session: 'The Lords, upon the report of Lord Meadowbank, and having advised the mutual informations and whole cause, they prefer the heirs of line of the deceased Lady Mary Ker to the fund in medio, and remit to the Lord Ordinary to proceed accordingly.' The appellants then made application to the Court, praying to give in an additional petition against the interlocutor just quoted; and on that application the following interlocutor was pronounced: 'The Lords having heard this petition, allow the petitioners to state their case in an additional petition, to be printed and boxed on or before the last sederunt day of the current session, and that under an amand of forty shillings; and appoint both petitions (the additional petition being duly lodged) to be seen and answered, the answers to be printed and boxed on or before the first box-day in the ensuing spring vacation, under an amand of ten pounds sterling.' Accord-

June 17. 1825: ingly the petition was stated, and answers put in by the respondents; and finally, on the 6th June 1823, the Lords of the First Division of the Court of Session pronounced the following interlocutor: 'The Lords having advised these petitions, with the answers, they adhere to the interlocutor reclaimed against, and refuse the desire of both petitions.'

From these interlocutors an appeal has been brought to your Lordships' House; and it must appear to your Lordships, from the statement I have made, that the questions in this appeal are questions arising on the law of Scotland, and the effect of the various titles which have been made up by these parties, and that the questions in this case do not at all turn upon what might have been the intention of these ladies: the question is a dry pure question of law, whether, under all the circumstances, the heirs-portioners of Lady Mary Ker were not entitled, on the death of Lady Essex, to this moiety of the estates in question? My Lords, the case has been most ably and most elaborately discussed in the papers which are before the House, and at the Bar. No one can have heard that discussion without being impressed with the correctness of that statement. The questions that have been moved in this case are, your Lordship perceive, of this nature: The Ladies Ker—who, if they could have succeeded in setting aside the deed of instructions, were entitled to this property as the nearest heirs of the Duke of Roxburghe—previous to instituting any proceedings for that purpose, had recourse to a proceeding known in the law of Scotland—a fictitious proceeding, for the purpose of making up a title in themselves,—namely, by granting a bond provisionally for the payment of L.100,000 to the trustee for himself, namely, my Lord Winchelsea, upon which he was to institute proceedings against them, as heirs-portioners of John Duke of Roxburghe, and to obtain against them what is called a decret of adjudication of the whole unentailed lands belonging to the Duke; and it appears, that decret of adjudication being obtained by Lord Winchelsea, he reconveyed the adjudication to Ladies Essex and Mary Ker, but no charter of adjudication was taken out in favour of these Ladies Essex and Mary Ker, although it appears that, after their deaths, such a charter had been obtained in favour of the present appellants.

My Lords,—The proceeding being in that state, the decret of adjudication having been got by them, but they not having obtained any charter of adjudication, they instituted the proceeding I have mentioned against Mr Wauchope, who was the trustee appointed under the previous deed of 1803 by the Duke of Roxburghe, and who had, subsequent to the Duke's death, taken an infeftment under that trust-deed. The object of that suit was, as your Lordships have perceived from my short statement, to set aside or reduce, as it is termed in the law of Scotland, the deed of instructions, on the ground that it was executed on deathbed, and affected the heritage of the Ladies Ker, and therefore ought not to be sustained; and if they succeeded in reducing that deed, they called on Mr Wauchope to convey to them the lands

June 17. 1834.

which he held, and of which he was possessed under that trust-deed. My Lords, they succeeded in that action, the House of Lords affirmed the decision of the Court of Session; and your Lordships perceive, that in consequence of the decision, and in consequence of the Court below directing and declaring that the trustees were bound to execute *quam prius*, in favour of Ladies Essex and Mary Ker, all proper conveyances, a disposition was accordingly executed by Mr Wauchope, and in virtue of the precept contained in that disposition, Ladies Essex and Mary Ker were infeft, and their infeftment duly recorded. My Lords, it has been contended in this case, that notwithstanding they thus made up their titles, it would be competent for them, and subsequently competent for their trustees, to complete their title on the adjudication; and the effect of that, supposing it to be done, would be, as was contended on the part of the appellants, to abrogate the other title vested in those ladies in the present appellants. On the other hand, on the part of the respondents, it was contended, and of that opinion the Court of Session were, that by the acts of these ladies they relinquished or abandoned any intention whatever of completing their titles in that fictitious suit; that they made up their titles under the deed of Mr Wauchope, and that that was their title to possession. Indeed it was contended, with a great deal of plausibility and strength, that considering the nature of that conveyance to Mr Wauchope, it might be very questionable whether those ladies would have a right to make up their titles in this fictitious suit instituted by their trustee, Lord Winchester; but assuming that they could have done so, and that the property conveyed to the trustees by John Duke of Roxburghe was still to be considered as part of the lands for which they might make up their titles under the fictitious suit, still, they having elected to take under the disposition from Mr Wauchope, considering that as a sufficient title, the Court below have proceeded upon that as the title upon which the possession was to depend. My Lords, upon that part of the case a very elaborate argument has been presented to your Lordships, that it would have been competent for Lady Essex, who survived Lady Mary, still to have proceeded on that title, and that if it would have been competent for her, it was also competent for the trustees. My Lords, assuming again that it was not competent for Lady Essex so to have done, she claims under the title derived from Mr Wauchope's disposition; for your Lordships have heard that, upon the death of Lady Mary, Lady Essex was served heir in general to her, and she afterwards expedited a charter of resignation on the procuratory contained in the disposition by Mr Wauchope. She therefore made up her titles under that disposition which had been made by Mr Wauchope.

I have to apologize to your Lordships, perhaps, for calling your attention to this case to-day, because I feel rather indisposed, and not able to go into it in the manner I could have wished. I should not have proceeded upon it to-day, but I feel the necessity of calling your Lordships' attention to this and other cases without further delay, consider-

June 17. 1825. ing the period of the session to which we are arrived. But for that indisposition, I should enlarge considerably more upon this extremely important case; but, my Lords, upon this branch of it, it does appear to me, that in any way of considering this case, the title which has been made up by Ladies Essex and Mary Ker under the disposition of Mr Wauchope, and under the procuratory of resignation, is the title which is to govern the subsequent transmission of this estate. They had the power of electing, and they having elected to make up their title under that disposition, I think that is the title which must decide this case.

My Lords,—Another question was then made. It was contended; that, assuming that the title was thus properly made up by the Ladies Essex and Mary Ker, and that they had no right to revert to the other title under the adjudication; still, what took place after the death of Lady Mary had the effect of consolidating the dominium directum and the dominium utile of the estate, and that therefore it was competent for Lady Essex to dispose of that property as she did, and that her trustees are, upon her death, consequently entitled to it. Now, my Lords, I apprehend there is nothing more clearly established, than that a general service takes no feudal right out of the ancestor; and that if a person so serving dies without entering by special service, the general service has no operation to carry away the estate from the heirs of the party to whom that person is served heir by general service. Indeed, I do not find that disputed in this case. My Lords, I think as little can it be disputed, that by that conveyance from Mr Wauchope, and by the infeftment taken upon it by Lady Mary Ker, the feudal title in the dominium utile was completed by Lady Mary Ker to the pro indiviso half of the lands contained in the disposition; and I cannot do better on this occasion than to refer to that passage in Mr Erskine (2. 7. 16.) which has been referred to in this discussion, explaining this part of the service: He says, ‘By the more common style of dispositions, the disposer grants an obligation to infeft, and a precept of sasine, both a me and de me, in the option of the disponent, and sasine is generally taken upon such dispositions indefinitely, without specially referring to either of the two precepts.’ That is the case here. ‘In that case, the law which construes the sasine in the manner most beneficial to the disponent, who has the right of option to ascribe it to either of the two kinds, considers it as a sasine de me or base right; because, if it were accounted a public right, it would be ineffectual till the superior’s confirmation; but if the superior afterwards confirmed the right, it is held from that period as if it had been from the beginning a public right: see July 16. 1680, Bishop of Aberdeen: It is universally agreed, that a right which only holds base of the granter, is not by the superior’s confirmation rendered public, so as to make the grantee, whose right is confirmed, immediate vassal to the superior confirming; for the superior’s confirmation of base rights is intended for purposes quite different.’ Then he says, ‘It is to the

June 17. 1825.

' difference here stated between base and public rights, that the frequent use of base rights in our practice has been owing ; for many purchasers avoid taking a public infeftment, not chiefly to avoid the expense of confirmation, but the better to secure their purchase ; because a purchaser, by accepting a public right from the disponent, which is not effectual till it be confirmed by the superior, was in danger of being excluded by a sasine taken before his, upon a base right ' in the person of another.' And, my Lords, I apprehend, not only from what I have collected in the discussion of this cause, but also from the general information on the law of Scotland which I have been able to gain, that is considered as the established law of Scotland as applicable to dispositions of this nature, and that the laying down a contrary principle would go to unhinge the law of Scotland in this respect.

My Lords,—Upon this part of the case I think, that the admission which has been made by the appellants themselves in some of these printed papers, certainly shews that the decision of the Court of Session is a right decision. They say, in the additional petition presented to the Court of Session, ' the petitioners are willing to admit, ' that if there had been occasion here for an immediately operative ' infeftment—had they, for example, proceeded to borrow money by ' heritable bond, such an act would at once have characterized the infeftment as a base one ; and, upon the principle as already explained, ' would have afforded a fair ground to infer, that the alternative title ' by adjudication was intended to be abandoned.' Now this admission is a very important one, as it applies as well to the effect of the adjudication and title, which, as it is contended, it is competent for these ladies, or those representing them, to make up, as with respect to the effect of the proceedings by Lady Essex, after the death of Lady Mary, on the disposition of Mr Wauchope. My Lords, in a subsequent passage the same admission is repeated. ' It is admitted, that ' had the precept in Mr Wauchope's disposition been a public precept, or had there been no alternative obligation to infeft de me ' and a me, this last would have been the consequence of the sasine in ' the persons of Ladies Mary and Essex ; it would only have been an ' inchoated title, which, left uncompleted by confirmation, would have ' been a mere nonentity in feudal law.' Now, my Lords, although the admissions of a party, if he has made them under a mistake, are of little weight, yet I apprehend, in this case, those admissions were made consonant to the laws of Scotland ; and, as it seems to me, those admissions, independently of that which I have taken the liberty of stating to your Lordships, shew, that in this case it must be considered that the feudal title, the base fee, was completed in Lady Mary Ker ; and if so, I apprehend the consequence inevitably follows, that the general service which Lady Essex, on the death of her sister, took out, could not carry that base fee which was vested in Lady Mary ;

June 17. 1895. but the property must go to the heirs-portioners, the respondents in this case.

My Lords,—The third point raised is this: Supposing a good title to the lands had been completed by the Ladies Ker; supposing the rights of the respondents as heirs of Lady Mary were clearly established; still by their services as heirs-portioners of Lady Essex, they came under an obligation,—I will not say of contract,—but of disposition of her property. Now, my Lords, to that several answers have been made, and I think satisfactorily. The first answer is, that with respect to the disposition upon which the appellants founded, that was a mere general——*

In the next place, it is a mere general disposition; and I therefore think the case of Carmichael against Carmichael, which was cited in some part of the case, does not appear to bear upon it; and, lastly, that in this case they were forced to enter as heirs-portioners of Lady Essex, at the instance of the appellants; and that therefore now it is not competent for them to insist, that they, having called upon these parties to enter as heirs-portioners, can now turn round upon them having compelled them to enter as heirs-portioners.

My Lords,—It does not appear to me there is any ground whatever to object to the decision made by the Court of Session. Upon the whole, therefore, it appears to me, that the decision of the Court of Session is right; but I must remark one thing, that the interlocutor in this case has pronounced, that the respondents are entitled to the fund in medio. Now I should wish to know whether that fund in medio is constituted of the rents of the whole of the lands; because, if so, the interlocutor is wrong; for, I apprehend, all that the Court of Session meant to decide is, that the respondents are entitled to these funds in medio, so far as they are constituted of the half which belonged to Lady Mary Ker. If there is any difficulty upon that part of the subject, this House should guard the affirmance of this interlocutor in that way. The interlocutor is general; and therefore I would ask, Whether the funds in medio are constituted of the whole of the funds, or of the pro indiviso half?

Keay. We understand, my Lord, that they are composed of the rents of the pro indiviso half; but, I believe, upon that point there was little difference between the parties; and, if it is the pleasure of the House, it cannot injure our interest, that that should be expressed.

Lord Gifford. Then, perhaps, the proper course for the House to adopt will be to alter the interlocutor before us, so far as to declare, that it respects only the fund constituted of the rents of the pro indiviso moiety of the lands belonging to Lady Mary, and, affirming the interlocutor with that alteration, then it will go back to the Lord Ordinary to pro-

* A part of his Lordship's speech was here lost.

ceed accordingly. As it stands, it certainly refers to the whole fund in medio; and it is asserted in these papers, and I think was asserted at the Bar, that part of the funds in question were not constituted of this pro indiviso moiety belonging to Lady Mary. June 17. 1825.

Adam. There was a parcel of land not included.

Lord Gifford. There was a parcel of land, called Levine-side, clearly not included in the disposition of Mr Wauchope: perhaps it will be better for the House to insert after the words 'fund in medio,' 'in so far as that fund is constituted of the rents of the pro indiviso half of the lands.' I will prepare the judgment of the House, that there may be no mistake about it; and before it is moved here, the agents shall have an opportunity of seeing it, that there may be no mistake upon it. With that variation, I would move your Lordships that the judgment be affirmed.

Appellants' Authorities.—(1.) 1. Bell, Com. 641. 4. edith and cases there; Wight, 282. and cases there; Lockhart, Feb. 19. 1819, (F. C.); 2. Ersk. 7. 16.; Bell on Fides, 316.; 2. Ross, 172. 320.; 3. Bank. 2. 18.; Edgar, July 6. 1736, (3069.); Harvey, Dec. 12. 1811, (F. C.); Smith, June 30. 1752, (10,803.); Durham, Nov. 24. 1802, (11,220.)—(2.) 3. Ersk. 8. 54.; Carmichael, Nov. 15. 1810, (F. C.; affirmed May 15. 1816.)

Respondents' Authorities.—2. Ersk. 7. 16.; Robertson, Nov. 27. 1751, (3044.)

J. CHALMER—J. CAMPBELL,—Solicitors.

HUGH CALLUM, Appellant.

No. 40.

CHARLES FERRIER, Trustee on the Estate of Scotch Patent
Cooperage Company, Respondent.

Lien—Retention.—*Held,* (affirming the judgment of the Court of Session), That a person employed to cut wood under the superintendence of the manager of the employer, and who was not in actual possession of the wood, had no right of lien or retention for payment of his wages.

THE Scotch Patent Cooperage Company purchased the growing wood of Fairburn and elsewhere, in Ross-shire, and employed Hugh Callum and others to cut, bark, drag, and float it to Dingwall, at a certain rate per tree. The Company had a manager who superintended the work. Callum employed men, and commenced operations. After a good deal of the work had been done, and a considerable sum become due to

June 17. 1825.

1st DIVISION.
Lord Meadowbank.

June 17. 1825. Callum, the affairs of the Company got into such embarrassment, and their superintendant thereby so limited in pecuniary means, that Callum and his workmen were constrained, from want of regular payment, to suspend, and ultimately to abandon work, leaving the trees where they happened to be cut or floated. The Company proved bankrupt, and were sequestrated. Berry the trustee having advertised the cut wood for sale, Callum applied to the Sheriff of Ross-shire for an interdict against Berry and his agent Kelly, until his wages were paid; and shewed a balance of L. 381. 11s. due to him. The Sheriff found, 'that it is admitted by the respondents, (defenders), that the petitioner was employed to cut, bark, drag, and float the wood in question, and that the petitioner's charge for these operations is not disputed. Finds, that the petitioner had a lien over the wood to the extent of his claim; and that the respondents, who were long since aware of the nature and amount of that claim, should have settled it in some shape or other, before attempting to dispose of the wood to his prejudice. In these circumstances, the Sheriff continues the interdict until the respondents find security acted in the Sheriff Court books of Ross, that the amount of the petitioner's claim, as stated in the petition, or whatever sum may be ultimately found due to him, shall be paid to him from the proceeds of the wood, when sold.' The trustee put in a minute, that he by no means acquiesced in this interlocutor, but offered to find security for whatever sum should ultimately be found due. The following bond was in consequence granted by Forsyth and M'Gregor as cautioners:—'We, &c. do hereby bind and oblige ourselves, conjunctly and severally, and our heirs, executors, and successors, as cautioners and sureties, acted in the Sheriff Court books of Ross, for John Berry, trustee on the sequestrated estate of the Scotch Patent Cooperage Company, Port Dundas, Glasgow, and Alexander Kelly, writer in Dingwall, his agent and mandatary, that they shall make payment to Hugh Callum, residing at Dalarick, or to any person or persons to whom the Sheriff-depute of Ross and Cromarty shall decern payment to be made, of the principal sum of L. 493. 8s., deducting the sum of L. 141. 17s. said to be paid in part; conform to account, with affidavit, produced by the said Hugh Callum, and referred to in an application or petition for an interdict presented by him on the 3d day of June last to the said Sheriff and his substitutes, against the said John Berry and Alexander Kelly, with interest of said sum since due, till paid;

‘together with all damage and expenses which may be awarded by the said Sheriff and his substitutes against the said John Berry and Alexander Kelly in the said process of interdict, or of whatever other sum shall ultimately be found due to him the said Hugh Callum in the said process of interdict, and that out of the proceeds of the wood, the subject thereof, when sold, in terms of the Sheriff’s interlocutor of date the 24th July last; and we consent to the registration,’ &c. In respect of this bond, the Sheriff recalled the interdict, and granted warrant to the respondent of ‘new to advertise the wood in question, and to dispose of the same by public roup to the best account.’ It was alleged that the wood produced only L.162. 16s. 2d. Before the sale, however, Callum charged on the bond. Forsyth and M^cGregor suspended. An ordinary action was also raised against the trustee, who then brought a reduction of the proceedings before the Sheriff. Berry in the meanwhile was succeeded by Ferrier. The Lord Ordinary sustained the defences in the ordinary action, and the reasons of suspension and of reduction; and the Court (20th December 1822) adhered.*

Callum appealed.

Appellant.—1. The parties are bound by the judicial reference and the bond of caution.

2. An artificer who gets a commodity to operate upon, or to transform in any shape, has a lien for the price of his labour; and the appellant was entitled to the advantage of this privilege. When he and his workmen were originally employed, they had clearly such possession of the wood as founded a lien for remuneration of their labour. The possession required must be suited to the nature of the labour; and the appellant, in the act of cutting down the wood, and floating it to its destination, had all the possession of which the case was susceptible. He had no right of property or possession of the ground or water where the wood lay, but he had a legal possession of the wood sufficient to maintain his lien. The appellant did not, previous to the sequestration of the Cooperage Company, voluntarily quit possession of the wood. The work was stopped solely from the Company ceasing to make the advances incumbent on them. The wood was not ceded to them, but remained where

* 2. Shaw and Dunlop, No. 99.

June 17. 1885. cut, and by interdict was prevented from being sold until the arrangement of the bond of caution.

Respondents.—1. There was no judicial reference, nor acquiescence in the Sheriff's judgment, but merely an obligation to pay what should be finally awarded, and no final adjustment has followed. Besides, the Sheriff's interlocutor has been reduced and set aside.

2. The appellant's claim is not privileged; nor has every tradesman of necessity a lien or security over the subject of his operations for the expense of these operations. To constitute a lien there must be actual possession. Callum had not that possession. He was merely the contractor for cutting, &c.; but the Company's overseer was on the spot to superintend and pay wages. At any rate the appellant gave possession up, and abandoned the work. In these circumstances, it is in vain to assert a right of retention to the prejudice of the Company's creditors.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed.'

Appellant's Authorities.—1. Bell's Com. p. 177. 5th edit.; Stat. 54. Geo. III. c. 137. § 38.

Respondent's Authorities.—2. Bell's Com. p. 158-91-95. 5th edit.

SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 41.

THOMAS, Earl of STRATHMORE, Appellant.

Sir JOHN DEAN PAUL, and Others, Trustees of JOHN late Earl of STRATHMORE, Respondents.

June 17. 1825.

1ST DIVISION.

Aliment—Expenses.—Held, (affirming the judgment of the Court of Session, with costs),
1. That the younger brother of an Earl, who had attained majority,—had received a provision from his father of L. 12,500,—and who had succeeded to the titles, but was excluded from the estates by a trust-deed executed by his brother in favour of trustees,—had no claim of aliment against these trustees, although he was destitute, and the estates had originally belonged to his father. 2. That he was not entitled to payment of the expenses of process out of the trust-estates.

From an early period the estates of the family of Strathmore had descended through a regular series of heirs, till they became vested in John 9th Earl of Strathmore, the father of John 10th

Earl, (the constituent of the respondents), and of the appellant. June 17. 1825.
 Their father died in 1776, and under his marriage-contract the appellant (who was a younger son, and then a minor) was entitled to a provision of L. 12,500. He was maintained and educated out of this provision; and, after attaining majority, he granted a discharge to his brother for the sums advanced him, and the residue of his provision, by which he exonered 'the said John, now Earl of Strathmore, and his heirs, executors, successors, and representatives, and all others the heirs and representatives of the said John Earl of Strathmore, my father, of all claim and demand competent to me against them,' in relation to his provision. By the death of an immediate elder brother, the appellant succeeded to an estate in England worth L. 3000 per annum, and by his marriage acquired a sum of money; but it was alleged, and not disputed, that he was now reduced to a state of destitution. His brother, Earl John, executed a deed of entail and nomination of heirs, and a trust-disposition; by which he vested his whole estates in the respondents, as trustees, for thirty years; and thereafter, during the survivance of the appellant, and of John and Charles Lyon, the two next heirs entitled to succeed after the appellant's son Lord Glamis; and appointed the trustees to vest the rents in the purchase of lands in Scotland, to be taillied under the same conditions, and to the entire exclusion of the appellant.

Lord Strathmore died on the 3d July 1820 without lawful issue, and was succeeded in his titles by the appellant. He then brought an action of aliment before the Court of Session against the trustees, in which, after setting forth the antiquity and dignity of the family, the deeds executed by his brother, and stating that the annual income of the whole estates exceeded L. 12,000; that the deeds were contra bonos mores, and ultra vires, and that he had brought a reduction of them; he subsumed, 'seeing that, by the law of nature, as well as by the laws and practice of Scotland, the said Thomas Bowes, Earl of Strathmore and Kinghorn, pursuer, as representing the said noble family, and inheriting the titles, honours, and dignities descending along with the said estates through a long line of ancestors, and for the suitable support whereof the same were originally granted, is entitled, in the mean time, to be alimented out of the proceeds and profits of the said estates vested in trust as aforesaid, in a manner suitable to his rank and station;'—he then concluded, that 'therefore it ought and should be found and declared, by decret of our said Lords of Council and Session,

June 17. 1825. ' that the said Thomas Bowes, Earl of Strathmore and Kinghorn, ' pursuer, is in the mean time entitled to a maintenance for him- ' self and his family, and to an aliment suitable to their elevated ' rank and station, out of the rents, produce, and profits of the ' foressaid estates vested in trust as aforesaid, and whereunto he ' was entitled upon the demise of the said John Bowes, Earl of ' Strathmore, his brother, along with the said titles and dignities, ' in terms of the former rights and investitures of the same : and ' it being so found and declared, the said James Farrer, James ' Farrer Steadman, James Dundas, and Sir John Dean Paul, ' Bart. as trustees and executors aforesaid, ought and should be ' decerned and ordained, by decret of our said Lords of Coun- ' cil and Session, to make payment to the said Thomas Bowes, ' Earl of Strathmore, pursuer, of the sum of L.4000 sterling ' yearly, as a reasonable and suitable allowance, according to his ' rank and station, for the support of the dignity of the said an- ' cient and noble family to which he has succeeded, and for the ' maintenance, education, and support of himself and his family, ' or such other sum, less or more, as our said Lords may think fit ' and reasonable in the circumstances of the case, and that at four ' terms in the year, Candlemas, Whitsunday, Lammas, and Mar- ' tinmas, by equal portions, beginning the first term's payment ' thereof at the term of Lammas 1820, being the first term after ' the decease of the said John Bowes, Earl of Strathmore, and ' quarterly thereafter during all the years and days of the lifetime ' of the said pursuer, or during the subsistence of the said trusts, ' with a fifth part more of penalty for each term's failure in pay- ' ment of the said aliment, and annualrent thereof from and after ' the said respective terms of payment, during the not-payment ' of the same.'

Against this action the following defences were returned : ' The ' defenders have no personal interest in opposing the pursuer's ' claim, but they are bound to defend the funds committed to ' their charge ; and they are advised, that the pursuer has no claim ' for an aliment, either " by the law of nature," or " by the laws ' and practice of Scotland."'

On advising memorials, and a hearing in presence,—

Lord Hermand observed,—This case must be decided, not on supposed grounds of equity, but upon legal principles. In cases of aliment, the legal principles upon which a claim can be made are just three : 1st, The *jus naturæ* ; 2d, The *jus representationis* ; and, 3d, The obligation of the liferenter to aliment the fiar, taken in connexion with the statute 1491. The claim here is founded

on the two first of these grounds. But the pursuer obtained a provision from his father of L. 12,500, whereby the obligation on the father was discharged,—a defence which could have been pleaded by the father himself. But, at all events, he is dead, and it is clear that the obligation being discharged, and there being no claim against the late Earl, except on the supposition of that obligation still subsisting, there is no ground for the plea of representation. Although, therefore, I have a great aversion to the settlement made by the late Earl, yet I am afraid there are no legal principles on which we can award aliment. June 17. 1825.

Lord Succoth.—I am entirely of the same opinion. The pleas of hardship, exalted station, and so forth, can furnish to us no legal principles on which to give aliment. There are just three grounds, as has been stated by Lord Hermand, on which aliment can be awarded. In this case the *jus naturæ* cannot apply, because the claim is made against the trustees of a brother, a collateral relation : neither has it any foundation on the statute 1491, because the pursuer is not, and never can be *fiar* of the estates : neither is there any claim *jure representationis*, which does not constitute a universal liability, but is of a limited nature. There can be no claim against a brother, unless, 1st, The claimant is totally destitute ; and, 2d, Unless he is in minority. But here the pursuer is above majority ; and he received a provision from his father, for which he granted a discharge. The circumstance of his having spent his provision, cannot revive his claim for it, or entitle him to come against his brother's trustees. It is true, that the claim on the *jus naturæ* is not so easily extinguished as that founded upon the *jus representationis* ; but there is no room for it here. The decision in Loch's case was founded on his right as *fiar*, and not on the *jus naturæ*.

Lord Balgray.—This claim, as has been already stated, is founded on the *jus naturæ* and *jus representationis*. The pursuer's father made a provision for him, and the obligation was fulfilled. Nevertheless, however, if the father had been alive, and the child reduced to a state of destitution, I hold it to be undoubted law, that the father would have been bound to receive him into his house, or maintain him. But this is an obligation personal to the father, and is not transmissible against his heir.

Lord Gillies.—I certainly dislike these settlements, but I am sorry that I must agree in the opinions which have been delivered. I concur in what has been stated by Lord Balgray as to the obligation on the parent and child. It is perpetual and

June 17. 1825.

reciprocal. But when once fulfilled by a provision being made for the child, it does not transmit against representatives. This is clearly and accurately laid down in Erskine. The father and child can never extinguish the obligation to aliment each other when reduced to indigence. Even although a provision has been made, yet, if the parent or child fall into a state of destitution, the obligation to aliment revives. The case, however, is quite different in regard to a representative. If the father has implemented his obligation by supporting his child during his life, it ceases by his death, and cannot descend against his representatives.

Lord President.—As far as we can see, the late Earl was the fee-simple proprietor of his estates, from which he has excluded the pursuer. The ground on which the present claim is mainly rested is the *jus representationis*. It is said, that the father was bound to aliment the pursuer *jure naturæ*, and that this obligation transmitted against the late Earl *jure representationis*. It is not necessary to inquire, whether, if the father had been alive, he would still have been liable to aliment the pursuer, notwithstanding the payment of the provision, because the obligation on his son, the late Earl, was not co-extensive. But the father, during his life, did aliment the pursuer, and amply provided for him; and on this point Erskine is clear and explicit, that no liability can attach to the representative. Besides, there are various limitations to such a claim. In a question with the representative, it is limited to a person in minority, whereas the pursuer is long past majority. I have also considerable doubts as to the plea maintained by the pursuer, that we cannot take his former extravagance into account. I should like to know how many provisions he can claim, or how many demands for aliment he may make. Suppose we were to award him an aliment, and he were to sell it the next day, spend the price, and then come to us for another aliment, telling us he was destitute, could we not take his conduct into consideration in judging of his right to such plea? I apprehend that we could. Now, here he got an adequate provision for his support; he has spent it; and now he says we must allot to him another provision. Such a claim appears to me quite inadmissible.

The Court accordingly, on the 29th May 1822, sustained the defences, assoilzied the defenders from the whole conclusions of the libel, and decerned. And to this judgment they adhered on the 13th December thereafter, and refused a petition, praying that a sum should be allowed him out of the trust-funds for defraying

the expenses of the litigation; their Lordships holding that, by June 17. 1825. the nature of the deeds, he could have no claim whatever.*

The pursuer appealed.

Appellant.—This is an action for aliment, arising out of the present destitute condition of the appellant—not an action having any reference whatever to the provision secured to him by his father's marriage-contract. In judging of this case, therefore, regard must be had alone to the law of aliment. Now that law rests upon the broad principles of natural justice, expediency, and necessity; and although, no doubt, certain rules have been laid down as to the application of these principles, still regard must be had to the peculiar circumstances of each case. The appellant was the heir-at-law of his brother—the estates had been allowed to descend through numerous generations without an entail, and he was entitled to entertain the reasonable expectation that he would succeed to them. His brother, however, for reasons of a most unjustifiable nature, has excluded him from his succession to these paternal estates. Besides, the appellant is a Peer of the realm, and cannot, consistently with constitutional rules and established custom, support himself by the labour of his hands. It is clear, therefore, that the appellant is placed in a situation of great hardship, and is entitled to relief out of the funds in the hands of the respondents, if a shadow of liability attach to them. Now it is admitted, that the appellant's father was under an obligation to aliment him, and that if he did not do so, this obligation was transmitted against the late Earl. But it is said, that this was discharged by the payment of the provision, and that the obligation is not transmissible. The obligation of the parent, however, is perpetual, and consequently attaches to his property, even although he may at one time have made a provision which has proved insufficient. Attaching therefore as it did to his property, it followed that property when it came into the hands of his representative; and as it is now confessedly in the possession of the respondents, they are bound to make that provision out of it for the appellant, which his father would have been obliged to do. Besides, the payment of the provision was not made in implement of the obligation of aliment, but of the marriage-contract.

In regard to the expenses of the process, the Court ought, con-

* See 2. Shaw and Dunlop, No. 80.

June 17. 1825. sistently with numerous decisions, to have awarded them to him out of the funds.

Respondents.—In order to support his claim, it is indispensable for the appellant to bring his case within the operation of some of those recognized rules of law, by which claims of aliment are allowed. He cannot be permitted to refer to general considerations of equity, expediency, and hardship. The principles of equity and natural justice may be, and certainly ought to be, at the bottom of the law of aliment, as well as of every other department of law; but still the undoubted fact is, that here, as well as in every other department, the extent of the operation of those abstract principles has been, in the course of practice, defined by limits which the Court hold no discretionary power to transgress. But the appellant has found it impossible to bring the present demand within any of those classes of cases, in which there is, according to the law or practice of Scotland, ground for such a claim. Such claims are now referable exclusively to three sources: first, The *jus naturæ*, as in the cases of husband and wife, and parent and child, in which the natural obligation, coeval with the existence of society, has been adopted, as founding a legal claim; secondly, Representation, according to which, the obligation arising *jure naturæ* is held, in certain cases, and to a certain limited extent, to be transmitted against the representatives of the party who is subject to the natural obligation; and, thirdly, Positive statute, the Act 1491, cap. 25. as explained by practice, according to which the liferenter is bound to give a reasonable support to the *fiar* of the lands liferented. The first and last of these grounds for demanding aliment cannot be founded on by the appellant. He holds no claim, either *jure naturæ*, or as *fiar* of the lands vested in the respondents; and it will be found, that his claim derives just as little support from the principle of representation, being the only one to which he can refer in support of it. It may be true, that, by the law of Scotland, the obligation lying on the father, *jure naturæ*, to aliment a child, is not capable of extinction or discharge. It is an obligation inherent in the relation between the parties, which the municipal law of this country has adopted to its full extent. But it follows, from the very nature and source of that obligation, that it is not properly a debt, which necessarily implies the capacity of being extinguished by payment or voluntary discharge, but is truly a parental duty. Accordingly, it does not, by the law of Scotland, lead to any pecuniary claim at all on the part of the

June 17. 1825.

child. It merely imposes on the parent the necessity of receiving the child into his family, and allowing him to share the father's means of support as a member of the family. It follows, therefore, that such an obligation terminates by the death of the parent. The claim, however, against the representative is one in its nature essentially distinct. It is not a parental duty, and does not rest upon the law of nature, but is the creature of the law of Scotland, being properly a pecuniary claim or debt. But as it rests entirely upon the law of Scotland, the extent of it must be governed by that law. Now, where a parent makes a provision for one of his children out of his funds, and the residue goes to his heirs, it is clear that if a claim were competent against the heir, he would be made to pay twice over in discharge of the same obligation; and therefore it is settled, that where such a provision has been given, no pecuniary claim can be made against the heir. Besides, the obligation in the case of brothers is limited to their minority, whereas the appellant is far beyond majority.

As to the expenses, the appellant has no more right to claim them out of the trust-funds than out of the property of any third party, and the cases to which he has referred related to competitions on a common fund.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed, with L.150 costs.'

Appellants' Authorities.—2. Ersk. 9. 62.; Craig, 355.; 1. Stair, 5. 7. 12.; 1. Ersk. 6. 56. 58.; M'Culloch, Nov. 28. 1752, (Elchies, No. 48. Taillie).—(*Expenses*). Hardman, Jan. 25. 1822; Moffat, Dec. 8. 1813; Earl of Wemyss, Nov. 23. 1810.

Respondents' Authorities.—Forbes, 332.; Buchan, Feb. 23. 1666, (411.); Hastie, Nov. 10. 1671, (416.); Sommerville, Feb. 2. 1711, (422.); Douglas, Feb. 8. 1739, (425.); Campbell, Dec. 18. 1758, (428.); 1. Ersk. 458.; 1. Stair, 5. 10.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 42. Honourable MARIANNE M'KAY FULLARTON, Appellant.

Sir HEW DALRYMPLE HAMILTON, Bart. Respondent.

Tailie—Service of Heirs—Prescription.—A party, who was entitled to succeed to two estates as heir of entail, but the investiture of one of them preventing him (as was understood) from holding both, having repudiated one of the estates in favour of the next substitute, with a reservation of his own and his descendants' rights to take the succession of the estate on the failure of this and the next substitute and their descendants, or in the event that the repudiator and his descendants could take the succession consistent with the entail of the other estate; and the next substitute having obtained decree of declarator that he was the next heir entitled to succeed under the original entail, in consequence of the decree of repudiation; and having been served heir of tailie and provision in virtue of these proceedings, and expedite a charter and infeftment; but no contravention, irritancy, or forfeiture, having been declared against the repudiator;—Found, (affirming, with a variation, the judgment of the Court of Session), 1. That the descendants of the repudiator were not deprived of their rights under the original entail by the deed of repudiation, the decret of declarator, or retour of the service, it being now competent for them to hold both estates. 2. That under the destination in the charter to the next substitute, and the heirs-male of his body, 'quibus deficiet. aliis huiusmodi quibuscumque ex corpore dict. J. H.' (the common ancestor of the repudiator and next substitute), the descendants of the repudiator were, in legal construction, called prior to the heirs who, in the original entail, were subsequent to the next substitute in whose favour the repudiation was made; and that, at all events, the descendants of the repudiator were entitled to reduce the titles made up by the next substitute as contrary to the entail,—the right of the substitute and posterior heirs not having been secured by the positive prescription, and that of the descendants of the repudiator to reduce having been saved from the negative prescription, in consequence of the heir in whose favour the repudiation was made having, within the years of prescription, executed a disposition, in terms of the original entail, to himself and the heirs of his body, whom failing, to the repudiator nominatim, and his descendants, on which infeftment followed. 3. That, in order to defend against a challenge of such disposition, it was not necessary for the descendants of the repudiator to reduce the deed of repudiation, decret of declarator, service, and charter following thereon in favour of the next substitute; but that, in order to complete his title, it was competent for him to serve heir of tailie and provision under the original entail to such heir-substitute, as the person last infeft in the estate. And, 4. That the vicennial prescription of retours could not, in such a case, exclude the descendants of the repudiator.

June 20. 1825.

2D DIVISION.
Lord Reston.

ON the 19th June 1688, Lord Bargany, in contemplation of the marriage of his son John, Master of Bargany, with Jean Sinclair, daughter of Sir Robert Sinclair of Longformacus, bound and obliged himself, as a party to their marriage-contract, to infeft and seize the Master, and the heirs-male of the marriage; whom failing, the heirs of the body of the Master in any other marriage; whom failing, William the Master's brother, and the heirs-male of his body; whom failing, the

June 20. 1825.

heirs-male to be procreated of Lord Bargany's body; whom failing, the eldest heirs-female of the body of Lord Bargany, and the descendants of her body, without division; whom failing, the next heir-female of Lord Bargany's body, and the descendants of her body, excluding heirs-portioners; whom failing, John Houston, of Houston, &c.; whom failing, John Lord Bargany, his heirs-male whatsoever; whom also failing, to the said John Lord Bargany, his heirs and assignees whatsoever; the eldest heir-female, and the descendants of her body, excluding all other heirs-portioners, and succeeding always without division. The deed was in the form of a strict entail; and the whole heirs of taillie, male and female, were inter alia taken bound, on succeeding to the lands and baronies, to assume and bear the surname, arms, and designation of Hamilton of Bargany, as their proper surname, arms, and designation, in all time thereafter; and the doing the 'contrair hereof' was declared a contravention, whereby the contravener should amit, lose, and tyne his right, title, and succession to the lands, &c. which were ipso facto to fall and accresce to the next heir of taillie, as if the contraveners or their descendants were naturally dead. The Master predeceased his father, without having been infest, leaving issue of the marriage, Joanna, an only child. Lord Bargany died, leaving his son William, (afterwards Lord Bargany), and a daughter, Nicolas. William was served heir of taillie and provision in general to the Master, in virtue of the deed 1688, but was not infest.

Joanna married Sir Robert Dalrymple, eldest son of Lord President Dalrymple, of North-Berwick. By contract of marriage in March 1707, the President entailed North-Berwick (reserving his own liferent) upon Sir Robert, and the heirs-male of the marriage; whom failing, the heir-male of the body of Sir Robert by any other marriage; whom failing, upon such person or persons, or such other heirs descending of them, as the President should nominate and appoint, by a writ under his hand, at any time during his lifetime; and failing such nomination, or persons so nominated, and the heirs to be then mentioned, upon Hugh, second son of the President, and the heirs-male of his body, and so forth, upon the President's five sons; whom failing, to the heirs-male procreated or to be procreated of the body of the President; whom failing, to the nearest heir to the last fiar of the lands and estates, and their heirs, the heir succeeding being always descended of the body of the President; whom failing, &c. The entail also bore, that in case it should

June 20. 1835. happen that the succession to the estate of Bargany should devolve on Joanna, and the heirs-male of her body, whereby both the estates of Bargany and North-Berwick might happen to descend to the heirs-male of this marriage, and thereby the North-Berwick estate might be confounded with the estate of Bargany, and the name and memory of the President and his family might become extinct and sopite, 'which in no way is intended, 'but expressly designed, communioned, and agreed, that the said 'Sir Hugh (the President) his proper estate, name and arms, 'should be preserved distinct and separate from the family of 'Bargany;' therefore it was provided, that in case there should be more sons than one of the present marriage, and that the succession of the estate of Bargany should fall and devolve upon the heirs-male thereof, then the heir accepting the succession of the estate of Bargany, and the descendants of his body, should ipso facto amit and lose all right and interest they had or could pretend to the North-Berwick estate; and the succession thereof should immediately devolve to the next son of the present marriage, who should have access to serve himself heir to his predecessor who died last vest and seized in the lands, as if the heir so accepting the succession to the estate of Bargany, and the heirs of his body, had never existed. A similar provision was introduced, to meet the event of the succession to and accepting of the taillied estate of Bargany by the heirs of this marriage, after their succession to the North-Berwick estate, declaring their right to the North-Berwick estate ipso facto to cease and become void, ('except in the case of only one son descending of the present marriage'); and the right of succession should immediately devolve upon the next heir, not descending of the body of the contravener, accepting of the succession to the Bargany estate, in the same manner as if the person so contravening, and the heirs of his body, had never existed; and it should be lawful to the said next heir to establish the right thereof in his person, either by adjudication, declarator, or serving heir to the person who died last vest and seized therein preceding the contravener. But in case it should happen that there be but one heir-male of the present marriage, then he was permitted to accept of the succession to the Bargany estate, and should also have right to succeed to the North-Berwick estate; providing always he made such additions to the arms of the family of Bargany, and otherwise keep up the remembrance of Sir Hew his name and family, in as far as the provisions and conditions of the Bargany entail could admit of. Should, however, such only son happen to have

more sons than one, then the estates were to be separately bruik-
ed and possessed; and the heir descending of the said only heir-
male having right to the succession to North-Berwick, should
not accept of the succession to the estate of Bargany, under the
like irritancies; so that the two estates should be always separately
enjoyed, except when and so oft as it happened that there was
but one heir-male descending of the present marriage, which only
heir-male should, in any degree of succession, and in all cases and
events, have right to the succession of both the estates, under the
conditions, provisions, and irritancies specified. The contract also
contained a power, at any time during the President's lifetime,
to discharge and qualify all or any of the prohibitory and irri-
tant clauses contained in the said contract and taillie, and to re-
new the same at his pleasure; or to empower Sir Robert, or any
of the heirs of taillie above-mentioned, to discharge or qualify,
and also to renew the same, if they should think fit.

June 20. 1695.

Sir Robert and Joanna predeceased the President, and left
three sons—Hew, John, Robert (afterwards Dr Robert); and
two daughters—Marion and Elizabeth. Thereupon the Presi-
dent executed a deed (1734), permitting his grandson, Sir Hew,
to serve himself heir of taillie to his father (Sir Robert) in the
lands of North-Berwick, without inserting in his service the
clauses concerning the succession to the estate of Bargany, who
made up titles accordingly.

William, Lord Bargany, had been survived by a son James,
(afterwards Lord Bargany), and a daughter Grizzel, (married to
Thomas Buchan). James died in 1736, without issue; and thus
the line of male succession under the entail came to an end. He,
as well as William, had possessed merely on the personal titles
contained in the marriage-contract 1698.

On the death of James the question arose, to what heir-female
the succession opened? For this character the claimants were,
Sir John Hope, the eldest son of Nicolas, only daughter of the
entailer; Mary Buchan, daughter of Grizzel, only daughter of
William; and Sir Hew Dalrymple, son of Sir Robert Dalrymple
and Joanna the only daughter of John Master of Bargany, the in-
stitute of entail. The President immediately executed a deed (8th
April 1736), stating, that at present being fully satisfied that it is for
the interest of both families that the said Hew Dalrymple be en-
abled so far to accept of the succession to the estate of Bargany as to
be served and retoured heir of taillie to that estate, and thereby
be in a condition to denude himself thereof in favour of the next
person after him called to the succession of the taillie of Bargany,

June 26. 1825. ' which is the most regular and effectual manner of conveying
 ' the said estate in favours of the next person in the line of suc-
 ' cession by the taillie of the said estate of Bargany;' therefore
 he authorized and allowed Sir Hew to be served and retoured
 heir of the taillied estate of Bargany, according to the provisions
 and conditions of that entail, and to retain the name and arms of
 Hamilton of Bargany, as his proper name and arms, as long as
 he was and should be allowed to continue in the right of both
 estates of Bargany and North-Berwick, and no longer; the Pre-
 sident reserving power and faculty to renew and redintegrate the
 provision in the marriage-contract, disabling the heir of North-
 Berwick to enjoy both estates, and under the penalties and irri-
 tancies therein mentioned, or in any other such manner as the
 President should think proper to appoint; and declaring, that the
 heir contravening such directions should forfeit his title to the
 estate of North-Berwick, for himself and his descendants, and the
 right of succession should fall to the next heir of taillie. Next
 day the President executed another deed, referring to the
 powers and faculties in the marriage-contract of 1707, the exer-
 cise of them by the deed of 8th April 1736, and allowing his
 grandson, Sir Hew, to continue in the estate of Bargany all his
 (the President's) life, and to continue to use and bear the name
 and arms of Hamilton of Bargany, with such additions as might
 be consistent with the Bargany entail, and no longer; and ap-
 pointed and ordained Sir Hew, fiar of the estate of North-Ber-
 wick, and his heirs, to divest and denude himself omni habili
 modo of his right and title to the estate of Bargany, in favour of
 John Dalrymple, his second brother, and the heirs of his body;
 whom failing, to Robert Dalrymple, now his third brother, and
 the heirs of his body; whom failing, to the other heirs appointed
 to succeed to the estate of Bargany by the taillie thereof, and
 that within the space of six months after the President's decease,
 in ample form; reserving to Sir Hew the fruits and emoluments
 of the estate of Bargany, from the decease of Lord James to the
 period when Sir Hew was thus appointed to divest and denude
 himself; declaring the refusing or delaying to denude himself, or
 continuing to possess and intromit with the rents and emoluments
 after the time appointed for denuding, should import an irritancy
 of his right and title to the estate of North-Berwick; which es-
 tate should fall and accresce to John Dalrymple, and the heirs-
 male of his body, and to the other heirs appointed to succeed
 to the estate of North-Berwick by the said contract of marriage,
 who should be entitled to pursue and declare their right to the

same, and obtain the same established in their persons according to law, with other reservations and provisions. June 20. 1725.

Sir Hew, on the same day, granted assignation of the rents of the Bargany estates to a trustee, for certain purposes, proceeding specially, on the narrative of the above deed, 'that in case the succession to the estate of Bargany shall happen to devolve to the said Dame Joanna Hamilton, or any of the heirs-male of that marriage, that both the estates of Bargany and North-Berwick should not be possessed and enjoyed by one and the same person;' and that the President 'had appointed and ordained me, (Sir Hew, the grandson), who am far of the estate of North-Berwick, and my heirs, to divest and denude ourselves omni habili modo of our right and title to the estate of Bargany in favour of John Dalrymple, my second brother, and the heirs of his body; which failing, to Robert Dalrymple, my third brother, and the heirs of his body; which failing, to the other heirs appointed to succeed to the estate of Bargany by the taillie thereof, and that within six months after the decease of the said Sir Hew Dalrymple (the President), in ample form.' This was followed by factories, in the character of 'apparent heir of taillie to the deceased James Lord Bargany,' the accounts of which proved, that the rents of that estate were uplifted and paid either to Sir Hew (the grandson), or to his assignees in trust.

In the competition, which in the mean time was proceeding, the Court of Session preferred Sir Hew Dalrymple (the grandson) to Mary Buchan; but Sir Alexander Hope to both Mary Buchan and Sir Hew. The case was appealed, and the House of Lords (27th March 1739) preferred Sir Hew Dalrymple to both.*

During the dependence of this litigation, the President had died. Sir Hew (the grandson) had already been retoured heir in the North-Berwick estates; but the Bargany estates he merely possessed (through his assignee) upon his title of apparen-
cy; and the period now arrived when he was bound to denude himself of the latter, or expose himself to the penalty of contravention in the marriage-contract and deed of 9th April 1736. He resolved to retain North-Berwick (the most valuable), and to reject Bargany. Accordingly he executed, on the 18th August 1740, a deed of repudiation of the estates of Bargany, proceeding on a general mention of the entail of North-Berwick; the

* See I. Craigie and Stewart, No. 47. p. 237.

June 20. 1825. competition which had ensued for Bargany, with the final result; a narrative, that it appearing to have been intended by the parties to the contract of marriage 1707, that the two estates of North-Berwick and Bargany should be separately taken and possessed by the heir of the marriage, (except in the cases excepted); and were he now to take the succession to the estate of Bargany, he should thereby forfeit the right to the estate of North-Berwick for himself and his descendants in favour of John Dalrymple his brother-german; and being fully resolved to take and hold the estate of North-Berwick, and to allow the estate of Bargany to descend to and be taken by John Dalrymple in the terms of the Bargany entail; therefore, for the love and respect which he bore to John Dalrymple, and in consideration of the settlements of the estates of North-Berwick and Bargany, (with and under provision after mentioned), he, Sir Hew, repudiated and refused to accept of the succession of the estate of Bargany, and that to and in favour of John Dalrymple, the next heir of entail to the estate of Bargany; and consented that John Dalrymple should, in respect of the repudiation, serve himself heir of taillie and provision to James Lord Bargany, and otherwise make up titles in his person to the estate of Bargany, in such manner as was competent of the law, and as he should be advised; and that he instantly take possession of the estates, and uplift the rents in the tenants' hands, fallen due since the death of James Lord Bargany, and in time coming; providing always, that 'these presents shall nowise prejudice my 'own or my descendants' right to take the succession of the 'said estate of Bargany, upon failure of the said John Dalrymple, and Dr Robert Dalrymple, my third brother, and their 'descendants, or in case any event shall exist in which I or my 'descendants can take the said succession consistent with the 'foresaid taillie of the estate of North-Berwick, with which express provision these presents are granted by me, and accepted 'by the said John Dalrymple.'

Thereafter, 25th February 1741, John Dalrymple raised a process of declarator in the Court of Session. It set forth the entail of Bargany, the competition for the succession, the judgment of the House of Lords; recited the deed of repudiation, (thus engrossing the clause of reservation); and concluded that it should be found and declared that he had the only right and title to the succession to the said estate of Bargany, and that he ought to be served heir of taillie and provision to James Lord Bargany in the estate of Bargany, 'after the form and tenor of

June 20. 1825.

‘ the writs before narrated.’ The summons was recorded in the books of Council and Session. The action was raised against Sir Hew and some of the posterior substitutes; but they made no appearance. The Court found ‘ the points and articles of ‘ the foresaid summons relevant and proven by the writs foresaid ‘ produced, and found and decerned and declared conform to the ‘ conclusions of the libel.’ The decree (according to the usual form of decrees in absence) recited the summons, and the documents produced, *ad longum*. John Dalrymple then, in September 1741, expedie a general service as nearest heir of tailie and provision to James Lord Bargany. The verdict of the jury returned him lawful and nearest heir-male of tailie and provision to James Lord Bargany, described him as second son of the deceased Sir Robert Dalrymple and Joanna Hamilton, and stated that his eldest brother was alive. The retour, besides setting forth the same facts, quoted the marriage-contract 1688, the judgment of the House of Lords in 1739, and then proceeded thus:—‘ *Et secundum quoddam scriptum lie deed per ‘ dict. Dominum Hugonem Dalrymple, signat. et conces. de ‘ data 13mo. Augusti, et registrat. in libris Concilii et Sessionis ‘ 11mo. Novembris 1740, per quod repudiavit et recusavit accipere successionem dict. status de Barganie; et hoc ad et ‘ in favorem dict. Johannis Hamilton proximi hæredis talliæ ‘ in dict. statu de Barganie et concordavit quod dict. Johannis ‘ Hamilton (in respectu ejus repudiationis prædict.) seipsum ‘ hæredem talliæ et provisionis dicto Jacobo Domino Barganie ‘ inserviret et titulos in ejus persona ad dictum statum de Barganie conficiret eo modo quo de lege competit et secundum decretum declaratorium,’ &c. By this service John Hamilton took up the unexecuted procuratory of resignation in the marriage-contract of 1688. He forthwith executed it, and in common form the lands were resigned in the hands of the superiors in his own favour, and a charter of resignation from the Prince, in 1742, followed. ‘ *Dilecto nostro Joanni Hamilton de Barganie juri- ‘ consulto filio secundo demortui domini Roberti Dalrymple de ‘ Castleton procreat. inter illum et demortuam dominam Joannam ‘ Hamilton unicam filiam demortui Joannis Magistri de Barganie ‘ et sic hæredem femellam demortui Joannis Domini Barganie ejus ‘ avi et hæredibus quibuscunque ex corpore dict. Joannis Hamilton quibus deficien. aliis hæredibus quibuscunque ex corpore ‘ dict. dominæ Joannæ Hamilton procreat inter illam et dict. dominum Robertum Dalrymple abaque divisione.*’ The legal title of John Hamilton was fully described in the *quæquidem* clause,*

June 20. 1825.

which contained a repetition of the progress already described. The charter embraced all the prohibitory, irritant, and resolute clauses and conditions in the contract of marriage or entail 1688. John Hamilton took infestment in August 1742, and registration followed in September, being the first feudalization of the entail. In certain portions of the Bargany estates, held of subjects-superiors, John Hamilton completed his title in the same terms, and under the same conditions and fetters, by obtaining charters from the respective superiors.

Dr Robert Hamilton died unmarried, and John Hamilton had no children. In this situation, John, in 1780, 'for certain causes and considerations me moving, and in order to give effect to the entail executed by John Lord Bargany, and to the conditions upon which my own right and title to the lands under-mentioned was founded,' disposed 'to and in favour of myself, and the heirs of my body without division; whom failing, to Sir Hew Dalrymple, Bart. my brother, and the heirs of his body without division; whom failing, to the next heirs of the body of John Lord Bargany aforesaid, and the other heirs of tailzie contained in the foresaid deed of entail, in the order therein expressed; and which heirs of entail are herein after insert, word for word, as in the said deed of entail.' Infestment immediately followed, and was recorded.

It has been mentioned, that Joanna Hamilton had two daughters. Marion, the eldest, had married Donald Master of Reay, and had two sons; the eldest of whom, George Lord Reay, had two daughters, Marianne and Georgina. Marianne married Fullarton of Fullarton. These daughters, on their father's death, had been left without guardians; their only paternal uncle was insane; and they were stated as having been in infancy when these steps were taken by John Hamilton, their maternal grand-uncle.

Mrs Fullarton, considering herself aggrieved by these proceedings, raised, in 1793, a process of reduction and declarator against John Hamilton, and his nephew Sir Hew, (Sir Hew, the father, having died), calling for production of the deed of repudiation 1740, process of declarator 1741, the general service, the charter from the Prince 1742, with sasine thereon, and John Hamilton's deed of 1780, with sasine, all to be reduced (in so far as they were contrary to the entail of Bargany) in consequence of the defenders having forfeited their right to the succession; and that it ought to be found and declared, that 'the late Sir Hew Dalrymple, by his assuming and bearing the

June 30. 1825.

‘ name and arms of Hamilton of Bargany, upon obtaining the judgment of the House of Lords in his favour, and afterwards laying down and ceasing to bear and wear the said name and arms, &c. had forfeited the estate, or at least had lost and forfeited it by the deed of repudiation; and that John Hamilton, by the manner in which he made up his titles, or by executing the deed of 1780, or by the one or other of these acts and deeds, the said John Hamilton, defender, has contravened the said deed of taillie, incurred an irritancy of, and annulled, lost, and forfeited his right, title, and interest to the whole entailed lands and estate of Bargany, for himself and the descendants of his body; and that the pursuer ought to be served heir of taillie and provision to the said James Lord Bargany in the said lands and estate.’ And afterwards, in consequence of a sale and purchase of part of these lands by John Hamilton, to pay off some debt affecting them, she raised a supplementary action of reduction, calling for production of the deeds relative to the transactions, and concluding for reduction and declarator of irritancy.

John Hamilton produced his charter of 1742 and sasine, which, with forty years’ possession, he contended formed a title to exclude. To this Mrs Fullarton answered, that she was entitled to deduct the years of her minority. Lord Justice-Clerk MacQueen found, ‘ that in computing the period of prescription, the years of the pursuer’s minority are not to be deducted; and in respect that the charter and sasine 1742 are *ex facie* unexceptionable, and that no nullity or objection does from thence appear to lie against them; and that it is averred by the defender, and not denied by the pursuer, that the defender has, in virtue of that investiture, possessed the estate of Bargany from the date thereof to the commencement of the present action, without any challenge or interruption; finds, that the defender’s right to the estate is secured to him by the positive prescription, and that he is entitled to hold and possess the estate under the foresaid investiture in time coming, and that the same is sufficient to exclude the title of the pursuers in this reduction; and therefore assolizies from the reduction, reserving to the pursuers to insist in the declaratory conclusions of their libel, and particularly how far the taillie 1688 is affected by the investiture 1742, and whether or not the defender has incurred any irritancy under that entail.’ Mrs Fullarton having reclaimed, the Court (Jan. 13. Feb. 9. and Dec. 6. 1796) found, ‘ that in computing the period of prescription, the years of the pursuer’s

June 20. 1825. ' minority are to be deducted, and therefore that the defender ' had not produced a sufficient title to exclude.' *

John Hamilton died, but Sir Hew Dalrymple, his nephew, and who, under the deed of 1780, succeeded to John Hamilton, appealed. The House of Lords (Dec. 18. 1797) remitted back the cause, ' to review the interlocutors appealed from, and to consider how far the validity of the title to exclude, set up by the defender, is in this case involved with the title set up by the pursuer to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail in the manner alleged on his behalf; and if the Court shall hold these questions to be involved with each other, that they do pronounce an interlocutor for or against that title, and also on the effect which such judgment may have upon the interlocutors directed to be reviewed.' †

Under this remit, the parties entered into the merits of the declaratory conclusions of the summons, as to the alleged contravention and irritancies by Sir Hew and John. The Court, on the 23d November 1798 and 1st March 1799, being of opinion that Mrs Fullarton's claim was ill founded, altered their former interlocutor, sustained the defender's title as sufficient to exclude the pursuer's title, and assoilzied.‡ Mrs Fullarton appealed, and the House of Lords (June 3. 1801) reversed the interlocutors complained of; but declared and found, ' that the matters in the appellant's summonses complained of are not sufficient to sustain the conclusions in those summonses, or any of the said conclusions,' and therefore assoilzied the defenders.§

No further steps were taken by Mrs Fullarton in relation to this matter until 1814, when Sir Hew Hamilton having applied for an Act of Parliament to exchange part of the estate of Bargany for some of his unentailed lands, she made appearance for her interest, and obtained the insertion of a clause, declaring that nothing contained in the Act should affect her claim, or that of any other heir of entail to the estate of Bargany, if any they had. Thereafter, for the purpose of trying the question, she granted to Thomas Martin a trust-bond for one million sterling, on which he raised an action of adjudication: she also raised an action

* The Speeches of the Judges of the Court of Session are printed in the Appendix to this Volume, No. I. p. 1. to p. 25.

† In the Appendix, No. I. p. 25. to p. 33. will be found notes of the opinions said to have been delivered on this occasion in the House of Lords.

‡ See the Speeches in the Appendix, No. II. p. 1. to p. 33.; and Mackay v. Fullarton, Nov. 23. 1798, (11,171.)

§ See App. No. II. p. 33. to p. 39.

calling for exhibition of the deed of 1780, and the titles made up by Sir Hew founded upon that deed; and concluded, 'that they should be reduced, and that it should be declared, that, by the terms of the foresaid contract of marriage and deed of entail 1688, charter 1742, and infestment thereon expedite by the said John Hamilton of Bargany, charters from "subjects-superiors," and infestment thereon, the said Marianne Mackay Hamilton, pursuer, is next in the order of succession failing the said John Hamilton and the heirs of his body, and the said Robert Dalrymple and the heirs of his body; and they having accordingly failed, she has the only good and undoubted right and title to be served heir of tailie, under the said investiture, to the said John Hamilton of Bargany, to the exclusion of the descendants of the late Sir Hew Dalrymple, the eldest brother of the said John Hamilton; and that the said pursuer ought to be served heir of tailie and provision to the said John Hamilton of Bargany, in the said lands and estate of Bargany, after the form and tenor of the said deed of tailie 1688.' Sir Hew objected, that the judgment of the House of Lords in 1801 formed a 'res judicata;' and that, on the merits, her claim was not well founded. The Lord Ordinary repelled the defence of 'res judicata,' but on the merits assailed the defender, and the Court, on the 21st May 1818, adhered.

Both parties having appealed, the House of Lords,* on the 26th July 1822, found, 'that the judgment of the House, on the petition of appeal depending before the House, on the 3d of June 1801, does not preclude or affect the question, whether the appellant is now entitled to claim the said lands, according to the title insisted on by her summons in the action, which is the subject of her present petition of appeal; without prejudice, however, to the right, if the respondent hath any, under the deed of repudiation of the 13th August 1740, or the right, if any he now hath, to reduce the said decret of the 25th of February 1741, or the retour of service in pursuance of such decret, or the said charter of the 26th July 1742; or the right, if any he hath, under the limitations contained in the said charter of 1742, or under the deed of the 21st June 1780, or the infestment of the 24th and 25th October 1780, or under the other charters from subjects-superiors, libelled on in this case: and it is ordered, that, with this finding, the cause be remitted back to the Court of Session in Scotland, and that the Judges of the Division to which this

* See 1. Shaw's Appeal Cases, No. 49, page 265. where a full report is given.

June 20. 1825.

' cause is remitted, do require the opinions of the Judges of the
' other Division of the said Court, in the matters or questions in
' this cause : and it is further ordered and adjudged, that the
' said cross appeal be, and the same is hereby dismissed this
' House.'

The Court of Session (Second Division) appointed memorials, which having been laid before the other Judges,—

Lords President, Hermand, Succoth, Balgray, Gillies, Alloway, Cringletie, Meadowbank, Mackenzie, and Eldin, gave this opinion:—We have attentively perused the memorials in this cause, and have considered the different points of law which occur therein; and after having had several conferences on the subject, we have come unanimously to the following opinion:—

1mo, We hold it to be now a fixed and unalterable point, that neither by the transactions assumed as the grounds of the charter 1742, nor by that charter, was there a contravention committed by Sir Hew Dalrymple against the entail 1688.

2do, As Sir Hew did not forfeit, he and his descendants still continued the nearest and true heirs under the entail 1688; though by the charter 1742 they lay under a temporary and defeasible exclusion, of which afterwards.

3tio, The deed of repudiation by Sir Hew did not deprive him or his descendants of their character as heirs of entail.

For, in point of fact, Sir Hew did repudiate only for himself personally, and not for his descendants, the right of whom, under the entail 1688, was expressly reserved.

Sir Hew's repudiation for himself personally was further qualified by a reservation of his own right under the entail 1688, and of his power to assert it whenever he thought proper, of which afterwards.

In point of law, Sir Hew could not renounce for his descendants by the deed of repudiation. We are of opinion, that by the law of Scotland, if Sir Hew had taken it upon him expressly to repudiate or renounce the right of succession for his descendants; the deed would have been totally ineffectual, because he was not in title to grant it, or any other deed which could affect the estate, or their right of succession to the estate. For Sir Hew never was infeft in it, and had not even a personal right to it. He had only the privileges of an apparent heir, by means of which he was entitled to a beneficial possession of the lands under some restrictions; but without entering himself as heir, he had no right to the lands, either real or personal, and had no power over the titles or investitures. Sir Hew, therefore, had no power, by any deed, to affect the entail, or the condition of

the other heirs, even those heirs, his descendants, who might have been forfeited if he had contravened. June 20. 1825.

Therefore, the present Sir Hew, who was not included in, nor affected by the deed of repudiation by his grandfather, remains the true heir under the tailie 1688.

4to, We are also clearly of opinion, that Sir Hew is the true heir under the charter 1742.

That charter carries the estate to John Hamilton, and the heirs whatsoever of his body, whom failing, 'to the other heirs whatsoever of the body of the said Dame Joanna Hamilton.'

At that moment Sir Hew not only was one of those heirs, but he was the first and nearest of those other heirs called by the charter.

If A is the eldest son, and B the second son of their father C, and B makes a settlement on himself, and the heirs of his body, whom failing, on the 'other' heirs of the body of his father C, this, on failure of B and his heirs, would carry the estate to A and his descendants; and if so, the charter 1742 in like manner carries the estate to the descendants of Sir Hew. This would have been unquestionable if it had been an original charter, and so it is admitted by the pursuer. But we are of opinion, that it makes no difference whether this be taken as an original charter or not, because the meaning of a feudal investiture cannot be changed or affected by extraneous deeds or circumstances. Its meaning, and the import of the words used in it, must be gathered from those words, as used in that deed; and therefore, unless by some other clause in the charter 1742 it can be shewn that the words 'other heirs of the body' were intended not to include Sir Hew, they must be taken to include him. The only persons called antecedently to the substitution of the other heirs are, John Hamilton and the heirs of his body. Therefore the 'other' heirs must mean, all the heirs other than John Hamilton and his descendants. If Sir Hew on any other branch is to be excluded, it can only be by implication and surmise; for by grammatical construction they are not excluded; and by the technical construction they are expressly included.

But even in the case of an ambiguity in the expression of an investiture upon an entail, we hold it to be quite clear that a deviation from the original entail is never to be presumed.

It is argued by the pursuer, that succession cannot revert or ascend.

But the succession never descended to John Hamilton, and could not be said to ascend by the succession of Sir Hew; for John Hamilton was a mere intruder, who could not succeed as

June 20. 1825. heir to the estate without the forfeiture of Sir Hew. John's service was a mere nullity in every point of view, and so was the charter 1742. The descendants of old Sir Hew are therefore entitled to the succession, not as heirs of John, but in their own places as heirs prior to him, without any ascent in the right of succession, though, de facto, an intruder had for a number of years been in possession of the estate upon erroneous titles.

They are evidently in the same situation with all other heirs of entail, whose right for a time has been usurped; and we hold it to be clear, that though an heir of entail, who is prior in the destination, and entitled to succeed, should, from absence or ignorance of his own right, want of means, or incapacity to enforce it, negligence of his agents, and various other circumstances, give an opportunity to another heir who is called after him in the destination, to take possession of the entailed estate, and infest himself in it, this would not operate as a legal exclusion of the prior heir and his descendants. In such a case, the rightful heirs cannot lose their right of succession but by prescription. And as it would be competent to them, or any of them, to challenge the title of the intruder, so by the entail they would have right in their order to succeed to him after his death; and when they are called by the intruder's own investiture in their proper places according to the entail, there is an exact conformity between the investiture and the entail, as to their right of succeeding to him, the intruder, if they should not in his own lifetime insist on their right. This applies not only to John Hamilton, but to the heirs of his body called by the investiture 1742, who were in no better situation than John Hamilton himself; and as John Hamilton died without heirs of his body, the succession opens to Sir Hew, not as an heir of John, but as a prior heir, who does not take by ascending or going back in the destination, but by a lawful assumption of his own prior right. As a convenient mode of making up his titles, and to save time, and the expense of reducing the charter 1742, Sir Hew may, as has been frequently done in similar cases, serve himself as heir under it; but this is mere matter of form, as his substantial right and title to the estate is as heir under the entail 1688.

5to, So far as regards the actual intention of parties, we are of opinion, that Sir Hew and his descendants are plainly intended by the words 'other heirs.'

If it were competent to have recourse to extraneous deeds and circumstances to interpret the meaning of these words in the charter 1742, and thereby to ascertain the actual intention of the parties, it is evident that the charter must be considered not by

June 30. 1825.

itself, but along with such circumstances. In this view, certainly, the deed of repudiation by Sir Hew, and the decree of this Court reciting it at length, and appointing John Hamilton to be served heir in terms thereof, must be principally looked to; and in that deed of repudiation the right of Sir Hew and his descendants is expressly reserved.

As to the intention of John Hamilton, it was evidently to prefer Sir Hew and his descendants to all the other heirs of entail, excepting the heirs of his own body, who are called first after himself; for in the charter 1742, no notice is taken of Robert and his heirs, though referred to in the deed of repudiation. And his intention to prefer Sir Hew and his descendants to all the other heirs of entail, is farther proved by his summons of declarator, which expressly sets forth the deed of repudiation, which was recorded in the books of Council and Session, and which also engrosses verbatim the clause of reservation. Now as this was his only shadow of title, and by which he was bound not only in gratitude but in strict law, since he accepted of and founded on it as his only title, it is impossible to doubt that his intention in framing the charter 1742 was to give effect to the reservation, and that he used the appropriate and technical words, 'other heirs of the body,' purposely as including Sir Hew and his descendants, which is the true and correct import of the words.

The terms of the North-Berwick entail, and the different alterations of it made, or intended, have been introduced into the argument, but we think without any immediate connexion with the points in this cause. But the fact appearing from the North-Berwick entail, that if only one heir-male of the marriage existed, he should be entitled to hold both estates, is material in considering the question as to the actual intention of parties in framing the charter 1742.

By the law of Scotland, an heir of entail cannot be deprived of his right to succeed to the entailed estate, except in one of two ways: Either, 1st, By an irritancy and forfeiture declared against himself, or against his ancestor, and directed against that ancestor and his descendants; or, 2dly, By prescription, as a foundation for which the law requires, that the estate should be possessed for forty years continually, and without interruption, under titles and an investiture by which the heir is excluded from the succession. In this way, and in no other, can prescription operate against the heir.

These propositions are in our opinion indisputable; and if so, they are decisive of the present case, whatever views may be taken, either of the object and intention of parties, or of the

June 29. 1895. construction and import of those deeds, as to the effect of which parties are at variance, or which afford room for any dispute:—

First, Sir Hew Hamilton is the heir now entitled to succeed, in terms of the entail 1688.

Second, His right is not affected by any of the conditions of the entail, and has not been lost or destroyed by any declarator of irritancy or forfeiture.

Third, His right is not excluded by prescription.

For the only investiture under which it can be said that his right is excluded, is that which followed on the charter 1742.

But under the above-mentioned investiture 1742, the estate was not possessed for forty years, the period of prescription; for in 1780 there was a new investiture made up in the person of John Hamilton, who then and afterwards possessed the estate; and by the new investiture the right of Sir Hew, the heir of entail, to succeed to the estate, was not excluded, but was expressly recognized. Thus the estate was possessed not for forty but only for thirty-eight years, under an investiture by which Sir Hew's right of succession can, even constructively, be held as excluded. It is therefore impossible that his right should be extinguished or lost by prescription.

Neither of the parties have disputed the validity of the charter 1742; but we think it necessary to make some observations on that subject.

It is evident that the charter 1742 could have been set aside as erroneous by any one of the heirs of entail, including the repudiator, or any of his descendants. We conceive, that the deed of repudiation, and the service and decree of declarator 1740, which were the foundation of the charter 1742, were all deeds so erroneous, that the charter could not have been supported by them, or any of them; for the Court could never have passed that decree, if any opposition had been made to it; and besides, the charter would have been reducible, as being disconform to the warrants on which it proceeded. But the charter 1742 was altered by the investiture 1780; and we think that, whether the deed 1780, and infestment upon it, were or were not reducible, they were titles of possession sufficient to stop the course of prescription, in so far as it may be supposed to have been running against the heirs who were not called by the investiture 1742; and, subsequently to the investiture 1780, prescription could no longer run upon the investiture 1742 in favour of Mrs Fullarton. From these considerations we are of opinion, that no prescription has run upon the charter 1742, either against or in favour of any of the heirs of entail, unless it be on the supposi-

June 20. 1826.

tion, which we think is correct, that Sir Hew and his descendants were called by the charter; in which case we are of opinion, that prescription ran in their favour, and therefore in favour of the defender in this action, against the pursuer and the substitutes after her. We are therefore of opinion, that Sir Hew, the defender, has a sufficient title and interest to reduce the charter 1742, if he was not called by that charter, or if the deed 1780 shall be reduced, though none of the other heirs of entail has such a title, excepting the descendants of Sir Hew, who granted the deed of repudiation.

Whether it is necessary for Sir Hew to bring an action for reducing the deed 1742, as a defence against the pursuer in the present action, is another question; and we think it is not necessary; for whether prescription has run upon the deed 1742 or not, the case seems to be equally unfavourable to the pursuer. If prescription has not run upon it, we are of opinion, that it could be opened up and reduced, whereby the destination of the entail of 1688 would be restored, and Sir Hew's right would be preferable to that of the pursuer. If prescription has run in favour of Sir Hew, it must necessarily have been upon the charter 1742, and deed 1780, which supposes the deed 1780 to be effectual, and not reducible at the instance of the pursuer. At all events, we are of opinion, that if there should be any difficulty in the construction of the charter 1742, as it stands, the defender could immediately get quit of that difficulty by a reduction of that charter.

7mo, We are very clearly of opinion, that no difficulty arises from the retour of John Hamilton, as being fortified by the vicennial prescription, under the Act 1617.

We are of opinion, that the vicennial prescription could not run upon that retour, because it appears, upon the face of the retour itself, that the party who was served heir was not, and could not be, the heir of the person who died last vested in the right. John Hamilton was only the second son of Joanna Hamilton, whereas the right to the estate descended to his eldest brother, Sir Hew, by the terms of the Bargany entail. All this appears from the retour itself, which was therefore a mere nullity. We think, that no prescription could run upon such a retour, as it is a general rule of law, that prescription does not cover defects that appear upon the face of the writing upon which prescription is pleaded; and as it appears, upon the face of the retour, that John was not heir, it proves that fact, but cannot prove the contrary fact, that he was the heir of James Lord Bargany, the person last in the right. The retour refers to the judgment of the House of Lords affirming the judgment of the

June 20. 1825.

Court of Session, 'per quam compertum fuit quod status de Bar-gany descendit ad Dominum Hugonem Dalrymple de Castle-ton filium natu maximum,' &c. 'et quod ille debet inserviri hæres talliæ,' &c. The retour then refers to the deed of repudiation, as, 'quoddam scriptum,' &c. 'per quod repudiavit,' &c. 'in favorem dict. Joannis Hamilton proximi hæredis talliæ,' &c. We are of opinion, that the retour of John Hamilton could not have protected himself against a reduction, or other challenge of it;—but we are farther of opinion, that a retour, though correct and unexceptionable ex facie, and therefore sufficient to protect the person served as heir, after the vicennial prescription, is only of a personal nature; and though it may protect himself personally, cannot, after his death, affect the right of the true heir, for such was not the meaning of the statute. And it is worthy of remark, that if the vicennial prescription had been available to the heirs of the prescriber, so as to exclude the true heirs of the investiture, the forty years' prescription of land rights would by necessary consequence have been done away, and in every case of titles made up by service and retour a shorter prescription of twenty years would have been established, while, in the case of titles made up by precept of clare constat, adjudication in implement, or any other mode, the full prescription of forty years would have been required. It is evident, that a vicennial prescription of sasines, proceeding upon retours, is utterly inconsistent with the Act establishing the forty years' prescription in its very terms, by which it is provided, that, where there is no charter extant, the party must shew and produce instruments of sasine, one or more, standing together for the said space of forty years, either proceeding upon retours, or upon precepts of clare constat. We think, therefore, that it would be a total misconstruction of these two Acts, as they must be taken together, to hold that the vicennial prescription is of the smallest consequence in this case.

Lastly, As to making up Sir Hew's title, it does not appear to us that there is any difficulty.

1mo, The disposition 1780 is a good title, if Mrs Fullarton cannot set it aside, which she cannot, because we hold it to be clear that Sir Hew can reduce the charter 1742, which is Mrs Fullarton's only title, if it shall be held to exclude him, and revert to the original entail,—of consequence she has no interest to reduce the deed 1780, even if she were called in preference to Sir Hew by the charter 1742; and we are clearly of opinion, that Sir Hew was called before her by that charter.

2do, He may be served heir of provision under the deed 1742.

We have no doubt, as already mentioned, that it is competent to the true heir to make use of the feudal title erroneously made up by an usurper, as a convenient mode of making up his own title; or, June 20. 1895.

stio, Reducing that investiture, and disregarding it altogether, he may be served heir to James Lord Bargany, under the entail 1688.

On the cause coming to be advised by the Second Division,—

Lord Robertson observed,—In forming an opinion on this difficult and important case, we have had the assistance of the opinions of all the other Judges of this Court, whom we were directed to consult, and also the benefit of the full and able opinions delivered in the House of Lords, which have thrown great light on this case.

There are two main questions before us; first, What is the sound legal interpretation of the charter of the estate of Bargany granted to John Hamilton in 1742? whether the pursuer, Mrs Fullarton, is now called to the succession of this estate, under the destination to the ‘other heirs whatsoever of the body of Joanna ‘Hamilton;’ or whether the defender, Sir Hew Dalrymple, has under it the preferable right? Secondly, What is the effect of the deed 1780, if the legal interpretation of the destination in the charter 1742 is in favour of Mrs Fullarton? In order to arrive at the solution of these questions, it is necessary to attend to the very particular circumstances in which the charter 1742 was obtained.

By the entail of the estate of Bargany in 1688, the destination is to certain heirs-male, ‘whilk failing, to the eldest heir-female ‘of the body of the said John Lord Bargany, and the descen- ‘dants of her body, without division.’ Upon the death of James, fourth Lord Bargany, in 1736, without issue, the male line failed, and the question arose, who was entitled to the estate under the entail 1688? This question was finally settled by the House of Lords in favour of the late Sir Hew Dalrymple, the grandfather of the defender. He immediately entered into possession of the estate, granted assignation of the rents in favour of Mr Craig, and then granted a factory, first to a person of the name of Kennedy, and then to another person; and they successively accounted for the rents. He also assumed the name and arms of Hamilton of Bargany. All this was done without making up any title to the estate, Sir Hew possessing merely under his apparenecy.

On the death of the Lord President, his grandson (who was already in possession of Bargany under his apparenecy) became

June 29. 1688. entitled to the estate of North-Berwick; but by the entail of that estate, he could not hold the estate of Bargany along with the estate of North-Berwick, at least he could not hold it under the existing circumstances of the family. He was, therefore, under the necessity of making a choice between the two estates; and he preferred North-Berwick. The natural and legal consequence of his doing so was, that the right to the estate of Bargany fell to the heir next in the order of succession under the entail 1688, and that was Sir Hew's immediate younger brother John Dalrymple, afterwards John Hamilton of Bargany. It was necessary that Sir Hew should, by some authentic deed or instrument, declare that he took the one estate in preference to the other; and accordingly he executed the deed of repudiation on 18th August 1740, on the legal meaning and effect of which the merits of this question mainly depend. I shall afterwards call your Lordships' attention to the different clauses of this deed, and to what I humbly conceive to be the effect of the whole on the rights of the parties. But in the mean time I may observe, that it was important for Sir Hew that his refusal to take the estate of Bargany should be clearly and unequivocally ascertained, in order to avoid a forfeiture of North-Berwick for himself and his descendants.

John Dalrymple very soon after brought an action of declarator before the Court of Session, the summons in which recites the various titles of the estates of Bargany and North-Berwick: it then recites the deed of repudiation *ad longum*; and concludes, that, in virtue of these titles, and of the deed of repudiation *inter alia*, 'the said John Hamilton, pursuer, hath the only right and title to the succession of the said estate of Bargany; and that he ought to be served heir of *taillie* and provision to the said James Lord Bargany in the said lands and estate of Bargany.' The decree found, that Sir Hew Dalrymple had repudiated and refused to accept of the succession of the estate of Bargany, and that, in consequence thereof, his immediate younger brother John became truly the heir entitled to succeed to the estate of Bargany under the entail; and he was accordingly soon after served and retoured '*legitimus et propinquior hæres taillie et provisionis.*'

Having thus vested himself with the character of heir of *taillie* of the estate of Bargany, he completed his title in the usual and known forms of law. He executed the procuratory of resignation on the entail 1688, to which he had acquired right by his service; and he obtained charters from the subjects-superiors of certain parts of the estate. The charter from the Prince of

Scotland is dated 26th July 1742; and sasine was taken thereon June 29. 1742. 23d August, and registered 23d September 1742.

What was the situation of John Hamilton at this time? He had been served heir of taillie and provision under the entail 1688. It was in that character, and in that alone, that he used the procuratory of resignation, and it was in that character alone that he got the charter 1742. It is of great importance to observe, that the deed of repudiation was not engrossed in the charter and sasine 1742, and was not made a real burden on the lands by being entered on the records; and it is impossible to suppose that Sir Hew Dalrymple was not aware of that circumstance. I am satisfied that, by the whole of the titles, John Hamilton had, in the existing circumstances, become the true heir of entail of the estate of Bargany, entitled to hold it under the entail 1688, and under no other fetters or limitations whatever.

I shall now consider how far his title could be modified or affected by the deed of repudiation. I shall first consider that deed as containing an authentic declaration of Sir Hew's determination to repudiate, and to refuse to accept of the succession of the estate of Bargany; and then I shall consider the nature and effect of the conditions and reservations in that deed. 1st, It proceeds on the recital of the various deeds and titles regarding the succession to the estates of Bargany and North-Berwick, and then it proceeds in these words: ' And now I, the said Sir Hew Dalrymple, having duly considered the foresaid taillie of the estate of North-Berwick contained in the foresaid contract of marriage, and also the taillie of the estate of Bargany above-mentioned, dated the 19th day of June 1688 years; and that it appears to have been intended by the parties to the contract of marriage betwixt the said Sir Robert Dalrymple and Mrs Joanna Hamilton, my father and mother, that the said two estates of North-Berwick and Bargany should be separately taken and possessed by the heirs of the marriage betwixt the said Sir Robert Dalrymple and Mrs Joanna Hamilton, excepting in the cases therein excepted; and that in case I should now take the succession of the estate of Bargany, I would thereby forfeit the right to the estate of North-Berwick for myself and my descendants in favours of John Dalrymple, counsellor at law, my brother-german; and I being fully resolved to take and hold the estate of North-Berwick, and to allow the estate of Bargany to descend to and be taken by the said John Dalrymple, in the terms of the entail of the estate of Bargany; Therefore, and for the love and respect which I have and bear to the said John Dalrymple, and in consideration of

June 20. 1825. ' the settlements of the estates of North-Berwick and Bargany
 ' above recited ; wit ye me, with and under the provisions after-
 ' mentioned, to have repudiated, likeas I, by these presents, do
 ' repudiate and refuse to accept of the succession of the said estate
 ' of Bargany, and that to and in favours of the said John Dal-
 ' rymple, the next heir of taillie in the said estate of Bargany :
 ' and I consent that the said John Dalrymple shall, in respect
 ' of my repudiation aforesaid, serve himself heir of taillie and
 ' provision to the said James Lord Bargany, and otherwise make
 ' up titles in his person to the said estate of Bargany, in such
 ' manner as is competent of the law, and as he shall be advised ;
 ' and that the said John Dalrymple do instantly take possession
 ' of the said estate of Bargany, and uplift the rents thereof in the
 ' tenants' hands, fallen due since the death of the said James
 ' Lord Bargany, and in time coming.'

At the time of executing this deed, Sir Hew had been in possession of the estate of Bargany about four years, and had assumed the name and arms of Hamilton of Bargany. He was perfectly aware of the various deeds as to the succession to the estates of North-Berwick and Bargany, and he chose, *sciens et prudens*, to repudiate the succession to the estate of Bargany. There can be no question as to his power to do so. It is impossible to hold that he could be compelled to take the estate of Bargany, and thereby forfeit the estate of North-Berwick. There can be no question, therefore, as to his power ; and there can be as little that he exercised that power in the clearest manner, with a full knowledge of all the circumstances. I apprehend the consequence of this was just to open the way to the next heir under the entail in the same way as if Sir Hew had been naturally dead, and that the right of the next heir emerged independent of the will or intention of Sir Hew. It is true that he repudiated and refused the estate in favour of his immediate younger brother John ; and that he consented that he should serve himself heir of taillie and provision. But I consider these words as altogether without meaning ; for the moment he repudiated the estate, he was under the necessity of doing so in favour of John Hamilton the next heir : he could not repudiate in favour of his third brother Robert, or any more remote substitute, no more than he could do so in favour of a stranger to the taillied succession. John's right was good by the mere act of repudiation of his elder brother, and could not be made better by any declaration that it was a repudiation in his favour.

The right which John Hamilton acquired to the character of the heir of entail, in consequence of the deed of repudiation,

June 20. 1825.

could not be made effectual without a decree of declarator, so that it might be put in a technical form: but it was necessary merely for that purpose, so far as John Hamilton's right was concerned, in order that the fact that Sir Hew had repudiated the succession, and that John had thereby become the true heir, might be ascertained in an unquestionable manner; and perhaps it was as necessary for Sir Hew's security, to shew publicly and openly that he had repudiated the estate of Bargany, and consequently had not forfeited for himself and his descendants the more valuable estate of North-Berwick.

It is indeed said, that all these proceedings were a mere nullity, of no legal effect. But if that were the case, I would ask, who was the heir entitled to take the estate after the deed of repudiation? Was Sir Hew the heir after he had renounced the succession? Could the estate be in abeyance (if I may use the expression) till Sir Hew or some of his descendants, perhaps at some remote period, chose to accept of it, or could do so with safety? Could the fee of Bargany be in pendente, contrary to the known rules of our law? The legal and natural consequence of the repudiation, I apprehend, was, that John, the next substitute, thereby became the rightful heir, and was entitled to vest himself in the estate of Bargany, according to the usual forms.

The deed of repudiation contains certain conditions and reservations, in the following terms:—‘Providing always, that these presents shall noways prejudice my own or my descendants our right to take the succession of the said estate of Bargany, upon failure of the said John Dalrymple, and Dr Robert Dalrymple my third brother, and their descendants; or in case any event shall exist, in which I, or my descendants, can take the said succession, consistent with the foressaid taillie of the estate of North-Berwick, with which express provision thir presents are granted by me, and accepted by the said John Dalrymple.’ Let us consider, then, whether Sir Hew had power to make any such conditions or reservations at the time when they were made. The effect of them was to disturb the order of the taillied succession; and, after the estate had been possessed for years by John Hamilton and his descendants, and by Robert and his descendants, to bring it back to Sir Hew and his descendants: And this alteration of the order of succession was attempted to be done after Sir Hew had repudiated the succession, and consented that it should be taken up by another, and had thus rendered himself a stranger to the entail; so that at the very moment that he renounces the character of heir of entail, and deliberately

June 20. 1688.

and advisedly consents that John Hamilton should get that character, he attempts to exercise a right to controul the succession of that estate. But where are the words of the entail of Bargany which gave him any such power? And if such power is not conferred by the entail, I do not see on what grounds it can be maintained that he had any such power. It appears to me, that, by the mere act of repudiation, all his power over the succession was at an end: it must be abandoned, not under a condition, but out and out; because, to allow him to repudiate an estate for a time, and under conditions and reservations, and to take it again at some future and perhaps remote period, and on the occurrence of some contingent event, is just saying that he may controul the will of the entailer, and disturb the tailied order of succession, according to his pleasure.

Upon all these grounds, I think that, in consequence of the deed of repudiation, and the retour of John Hamilton, he became the true heir of the entail 1688, in the same way as if Sir Hew had been naturally dead; that the titles were made up under that entail; and that he possessed the estate under no other limitations or conditions than those imposed by that entail.

Keeping these things in view, let us consider what is the true meaning and legal interpretation of the destination in the charter 1742. The estate is disposed 'Joanni Hamilton de Barganie, juriaconsulto, filio secundo demortui Domini Roberti Dalrymple de Castleton, procreat. inter illum et demortuam Joannam Hamilton, unicam filiam demortui Joannis Magistri de Barganie et sic hæredem femellam demortui Joannis Domini Barganie ejus avi, et hæredibus quibuscunque ex corpore dict. Joannis Hamilton, quibus deficien. aliis hæredibus quibuscunque ex corpore dict. Domine Joannee Hamilton.' When you see it is a charter granted filio secundo, how can it include the elder brother, when it is plain, from the circumstance of the charter being granted to the second son, that the eldest son was entirely removed out of the succession? John Hamilton, the second son, was an heir of a particular description, who took the estate as heir of entail, in consequence of the failure of Sir Hew; and when the destination is to the heirs of John's body 'quibus deficien. aliis hæredibus quibuscunque' of the body of Joanna Hamilton, can these words be interpreted so as to bring in an heir who was preferable to John Hamilton himself? or must they not mean such heirs as John Hamilton was, and who are to take the succession after him? It may be farther observed, that the charter 1742 must be interpreted according to the

entail. Now, there is not one word in the entail of Bargany to sanction the strange anomaly of the estate, failing the second son and the heirs of his body, ascending to the eldest son. June 29. 1824.

The defender has anxiously argued, that, in the case of a taillied estate, the succession may revert and go back to a former heir: and in support of this, he founds on the cases of Lord Mountstewart against Lady Mackenzie, and of M'Kinnon against M'Kinnon. But it does not appear to me that these cases apply to the present question. They go no farther than to find, that the nearest heir existing at the time the succession opens is entitled to serve, though he may afterwards be obliged to denude on a nearer heir existing. In the case of Lord Mountstewart, the estate was settled on the second son of Lady Mackenzie of Langton's body, whom failing, on Lord Mountstewart. When the succession opened, Lady Mackenzie had no second son, and Lord Mountstewart took out a bribe for serving himself heir; and this was opposed by Lady Mackenzie, on the ground that though she had then no second son, there was a probability of her having one. But the Court held, that Lord Mountstewart was entitled to be served, though he might be obliged afterwards to denude. This was precisely the case, too, in the case of M'Kinnon. The estate was settled on the heirs-male of the body of John M'Kinnon elder, whom failing, on John M'Kinnon, tacksman of Messinish. There being at the time the succession opened no heirs-male of John M'Kinnon the elder, the tacksman of Messinish was served heir; but on John M'Kinnon the elder having a son, Messinish was found obliged to denude. The case here, however, is widely different. At the time of executing the deed of repudiation, Sir Hew was the nearest heir, and undoubtedly the preferable heir; and after assuming the name and arms of Hamilton of Bargany, and possessing the estate for four years, he voluntarily and advisedly repudiated that character altogether, and consented to his brother serving himself heir of entail and possessing the estate: Therefore I think these two cases are not at all applicable.

A case has been put, which I think throws a great light on the interpretation to be put on the words '*aliis heredibus quibus-
'cunque ex corpore dict. Domine Jannæ Hamilton.*' Suppose John Hamilton had died without issue immediately after the sasine on the charter 1742, what would have become of the taillied succession of Bargany? According to the plea of the defender, the succession must have reverted to Sir Hew; that is, it must have reverted to a person who had advisedly repudiated and refused to take

June 20. 1825.

the succession, for the very good reason that he could not have taken Bargany, without forfeiting for himself and his descendants the more valuable estate of North-Berwick; but as the difficulty that stood in Sir Hew's way to taking both estates still remained, he must have again repudiated the succession, and allowed Robert Dalrymple to serve heir and to take Bargany. It just leads to this, that the succession might be bandied backwards and forwards as it suited the inclination of Sir Hew, without any warrant from the words of the entail. But I cannot adopt an interpretation which leads to such a result.

But suppose that Sir Hew had the power to make a temporary repudiation of the estate, and to annex conditions and reservations which would make the order of succession depend on his interest or inclination, he has not exercised that power in such a manner as to render the deed a real burden on the estate. I have already noticed, that neither the deed of repudiation, nor the conditions and reservations, are engrossed in the charter and sasine; and although the deed of repudiation is no doubt referred to in general terms in the *quæquidem* in the charter, it is a perfectly settled point, that such general reference is insufficient to create a real burden.

On the whole, I am humbly of opinion, that, according to the legal meaning of the words in the charter 1742, the pursuer Mrs Fullarton is called to the succession of the estate, John Hamilton and his descendants, and Robert Dalrymple and his descendants, having failed.

I now come to the second question for our consideration, which is, What would be the effect of the deed 1780, supposing that the destination in the charter 1742 should be considered in favour of the pursuer? According to the view which I have taken of the charter 1742, and of the legal meaning of the words '*aliis hæredibus quibuscunque*,' this question admits of a short discussion. If John Hamilton had purchased the estate of Bargany with his own money, or if he had succeeded to it in fee-simple, and had then executed a deed of entail in terms of the deed 1742, with a reserved power to alter, and had afterwards, in virtue of that reserved power, executed the deed 1780, that deed would have regulated the succession to the estate. But that is not the case which has occurred here: for John Hamilton did not possess the estate in fee-simple, but as heir of entail under the entail 1688; and he possessed no powers over the estate but such as were conferred by the entail itself. He had no right to alter the succession specified in the deed 1742; and if the pursuer is called

to the succession after John himself, under the words ' aliis hæredibus quibuscunque,' he could not execute a new deed to exclude her. I consider the charter 1742 as the only valid and effectual title under which John Hamilton held, or could hold, the entailed estate; that he had no power to execute the deed 1780; and that, therefore, that deed can have no effect whatever on the rights of parties: And as John Hamilton possessed the estate under the charter and sasine 1742, peaceably, and without interruption, for more than forty years, every person having a right and interest under that charter and sasine has acquired a valid prescriptive title, which cannot now be challenged.

Lord Glenlee.—I certainly was of opinion with the judgment we formerly pronounced; and I have found nothing in these papers to induce me to alter my opinion; and it is confirmed by the opinions of the other Judges who have been consulted in this case.

It is very material to attend to the precise state of the question as it comes before us. I do not think that any person could for a moment suppose, that, by assoilzieing Sir Hew Dalrymple from the former action, which concluded for reduction of the charter 1742 as an irritancy and contravention of the entail, could stand in the way of our now finding that the pursuer is heir under that charter. But at the same time it is clear, that the grounds which she has now taken must be naturally very different from what they would have been, if the ultimate judgment of the House of Lords had been different. Your Lordships will recollect, that, in the original action, the prescriptive title founded on by Sir Hew was repelled by this Court, on the ground of the prescription being interrupted by minorities. The case was then appealed to the House of Lords; and it was sent back to us, to consider whether the title to pursue was not involved with the title to exclude; and there is no doubt that both the title to exclude, and the merits of the reduction, were fully discussed and considered by us; and opinions were given by your Lordships on both points. As to the merits, whether there were grounds for finding a contravention, the Court unanimously expressed their opinion, which was exactly the same with the ultimate judgment of the House of Lords: for we unanimously thought no irritancy had been incurred. We were unanimous on every point, except in so far as concerned the deed of repudiation. There was one Judge, and one only, who differed from us; but it turned out, that, happening to be also of opinion that the title to exclude was sufficient, it became impossible to put into the

June 20. 1825.

June 20. 1825.

interlocutor any finding as to this other point; because, if the prescriptive title was once sustained, it was impossible to pronounce a judgment in the reduction; for the Act 1617 does not merely say, that a person is entitled to be preferred on a prescriptive title, but that he must not be disquieted or pursued; therefore, when once a prescriptive title is founded on, there never can be any question on the merits. But when the case went to the House of Lords, they did not think themselves barred by the Act 1617, but held it competent to entertain the merits of the question; but at the same time it would have been inconsistent to do so, if they had allowed the judgment on the exclusive title to stand. They therefore recalled your interlocutor, and pronounced a judgment, finding that the matters in the summons were insufficient to support the conclusions. It is plain, if the matter had stood on our judgment, it would have been not only absurd, but quite wild, in the pursuer to have immediately raised a process, concluding that she was the heir, by Sir Hew having incurred an irritancy for the heirs of his body, and that he could have no place in the entail. After the judgment by the House of Lords, she not only had the opinion of this Court, but she had the judgment of the House of Lords against her, finding that the grounds of irritancy were not sufficient to support the conclusions of her summons. In the present summons, accordingly, there is no conclusion for finding that old Sir Hew had forfeited, and that the present defender had no place in the succession; but it is founded on these grounds,—that, taking the whole circumstances into view, and on a just interpretation of the charter 1742, she is entitled to succeed to the estate,—and that is just the question we are now to consider; so that all idea deducible from old Sir Hew having done any thing to forfeit his heirs from claiming under the entail, is entirely out of the question. That is implied in the remit from the House of Lords, and indeed from the pursuer's own summons, as she does not conclude that he had forfeited for his heirs. It appears to me that we have really nothing to do with that, and are not called to give our opinion on it: It has been already fixed and settled.

It is certainly very true, as stated by Lord Robertson, that it is a material point to consider what was really and truly the situation of the parties at the time of this transaction; and I own it is on a consideration of what was their true situation, that my opinion is founded. It is as clear as the light of day, that Sir Hew did not forfeit for his descendants; and that although matters were in that situation, that by legal proceedings Sir Hew might

June 20. 1825.

have been excluded, there were no proceedings known in our system of law to exclude his descendants. There is an idea very much founded on by the pursuer, that where an estate has once descended to, and been vested in a particular person, no person who was in existence at the time, who could have excluded him, can afterwards exclude him. I really do not think this doctrine sound. It is very true, that in the case where it can be shewn, that the right of the person calling on the other to denude, or claiming to succeed on his death, has been forfeited, he cannot exclude him. But if that cannot be shewn, the rule of law is just the contrary of what the pursuer wishes to make it. The rule always is, that the nearest heir at the time takes the estate, if something has not forfeited his right; but if a nearer heir afterwards exists, he cuts out and excludes the other altogether. He can either force the person who has got into possession to denude, or he may claim to succeed to him at his death. This is stated in the opinion of our brethren, who have been consulted, in very proper terms. I cannot conceive that it can be stated in stronger language. The cases of Lord Mountstewart, and of McKinnon, are important in this respect, as shewing that there is nothing unnatural in the succession reverting. Suppose that old Sir Hew, at the time of Lord Bargany's death, had happened to be abroad, and supposed to be dead, then John Hamilton would have been the nearest heir of tailie at the time, and the estate must have vested in him, and any powers exercised by him, which were consistent with the entail, would have been valid. But if Sir Hew had returned, would the mere circumstance of the estate having once vested in John Hamilton, his brother, have prevented Sir Hew claiming it, or, if he chose to wait, from taking it after John's death? Or, suppose an heir of Sir Hew, whose existence might not have been known at the time, had appeared, would John Hamilton have excluded him, or prevented him from calling on him, John, to denude, or serving in case of John's death? I apprehend he would not; or if he could, my brethren have gone very far wrong in the case of Mountstewart. And yet, in this case, so far as concerns the mere going back of the estate to a nearer heir, when once vested in another, the rule would have been as strong. I am not saying that there may not be cases interfering with this rule, (and we must consider if there is such a case here), but I am only speaking of the general unsuitness of an heir who has been excluded, being entitled to call on the remoter heir to denude, or claiming to succeed to him. Now, in 1741, it is perfectly plain that old Sir Hew had committed no irritancy—

June 20. 1825.

he had done nothing contrary to the entail—he had taken the name and arms, as he was bound to do, in the same way as the present parties have done. Perhaps old Sir Hew could not have attacked John Hamilton's title; but suppose Sir Hew had left issue, and suppose John Hamilton had brought an action for having it found, that Sir Hew had de facto given up the estate of Bargany, and that he, John, was now entitled to be served as nearest heir, would not Sir Hew's descendant, if he had appeared at the instant, have been entitled to say, 'No, it is not you, but I, who am the nearest heir, unless you can qualify that my father had done something to forfeit the estate both for himself and his descendants?' Now that is out of the question here, as it is plain no such forfeiture has taken place. I have no occasion to consider the case of a person to whom an estate is destined, and to the heirs of his body, and who declines to take the estate: there, all the persons are called as being the descendants of his body; but here they are called by the entail, merely as being descendants of the body of Joanna Hamilton; and it is as heirs to her that they succeed. They must have had a father, no doubt; but it is not in respect of their father, but of their mother, that they are called; and if their father does not chuse to interfere with the estate, he has no more power over their right, unless he incurred an irritancy, than over the right of any other substitute or any body else. In short, I see no more right he had to interfere with their succession, than the midwife who, to be sure, interfered in her way in bringing them into the world. If John Hamilton had convened Sir Hew in a process for finding, that, in consequence of the situation of the two estates, he was entitled to take up the succession, Sir Hew would have made an appearance for his descendants, as was made by Lady Langton in Lord Mountewart's case. It could not have stopped the service, and probably there would have been no reservation in favour of his issue more than in the case of Mountewart; but it is not improbable that Sir Hew would have taken some step or other; he would have given in a minute that it was not to interfere with the right of his descendants, and it might have happened that some of the Judges would have told him, that the judgment would not affect his issue.

That being the real state of the rights of the parties, it would be very extraordinary if any thing in the amicable arrangement, for carrying through the transactions, should interfere with the rights of the children; at least that the children, who did not exist at the time, should be affected, or that they should be affected at

any time within the years of prescription, by any deed executed by their father, other than by doing something contrary to the entail, by incurring an irritancy, or the like. June 20. 1825.

In considering what the parties have done, we must attend to the different deeds. I find a very nice philological discussion by the pursuer, as to the effect of reserving a right which did not exist; but when I came to the deed, there is not a word in it about reservation from beginning to end. To be sure, in our forensic dialect, it may be said that there was a reservation; but taking the deed as it stands, it is just a deed granted under certain provisions and conditions. And what is of very great importance, it is not only granted by Sir Hew, but accepted by John Hamilton, under all the conditions and qualifications therein contained, and under them alone. These conditions just amount to this, that if any occasion should occur in which Sir Hew or his heirs could take the succession of the estate of Bargany, this deed was not to stand in their way, and they were to be in the same place as if it had never been granted. The pursuer talks very lightly of this deed being referred to in the decree of declarator. But it is the crowning article in the libel; and decree is pronounced, conform to the tenor of the writs produced. I call it the crowning article of the libel, because it could not otherwise have stood for a moment; for the other deeds showed that the lands were destined to the eldest son, and that John Hamilton was the second son. There were no termini habiles for the decree without this deed. Suppose John Hamilton had just rested on the deed of repudiation and the decree of declarator, and entered to the possession of the estate, and thought no more of the matter, and that he had made up no title to the estate—for people often don't think of making up their titles, unless for a marriage or an election—how would matters have stood in a competition between Mrs Fullarton and the present Sir Hew, a descendant of old Sir Hew? Could she have come forward with the deed in her hand, and founded on it, saying, 'You, Sir Hew, are excluded by this deed?' He would have said, that, 'if you found on the deed at all, you must take it with that provision in the deed, that it is not to stand in the way of any claim of the descendants of old Sir Hew.' It is no matter whether the reservation and stipulations were lawful or not. A party who can only found on that deed, must take it as it is. If she had said, 'I have no occasion to found on that deed,' the case might be different: and I think she might have said with some effect to old Sir Hew, 'It is enough for me to

June 20, 1825. 'found on the fact, that you rebus ipsis et factis did abandon the 'estate.' But how could she hold that language to the descendants of Sir Hew? His acts can have no effect as to them. But she had, in fact, nothing to go on but the deed of repudiation.

Then comes another step of the progress, viz. the retour. It is always founded on as if John Hamilton was the heir under the entail. But he was clearly not so. He is the heir only *secundum tenorem* of the different deeds. The retour itself of his service is *secundum tenorem* of the entail, and then *secundum tenorem* of the deed of repudiation, and *secundum tenorem* of the decret of declarator. In the same way as a person taking a retour, in terms of the taillie, would be bound by all the conditions of the taillie itself, so is he bound by the terms of the repudiation and of the decret, by which alone he was entitled to be served. He is not retoured simply as heir of taillie and provision, but *secundum tenorem* of all the deeds; and it was absolutely necessary to put into the retour *secundum tenorem* of the decree, because, without the decree, neither the repudiation nor any of the other deeds could have authorized the retour. It is quite clear, that the mere renunciation of the nearest heir does not entitle another heir to go to a jury and get himself served. There must be a decree declaring his right. It is plain, therefore, to me, that this retour could not have been founded on to any effect, without admitting the conditions of the decree on which it proceeded, more than it could be founded on as exclusive of the conditions of the entail itself. But, whatever might have been the case with old Sir Hew, (and I think even he would have had a good pull for it too), nothing could have been said against his descendants. But, at any rate, the present Sir Hew may say, 'I am entitled, by my own inherent right, to set aside 'the whole of these deeds, and to assert my own rights;' and then the retour flies off.

The vicennial prescription has nothing earthly to do with a question of this kind; that is only a prescription of a retour of a person as a proper heir, and that no one else, if the prescription has run, is entitled to say the contrary to him. But if the retour is as heir of taillie and provision, then, if the entail is set aside, the whole flies off. Suppose a person settles an estate on the heirs of a marriage, many things may occur to make him wish to change this: he gets discontented with the heir of the marriage, and he makes an entail on another person, and then dies, and the heir of the marriage is out of the way, and the other person gets served. It is not the lapse of twenty years that would sustain his

right; the heir of the marriage would set aside the entail, and then the retour would fall away, not because it was erroneous, but because the whole foundation of it has vanished. So, if matters had just rested on the retour, I think that Sir Hew's issue, at least, were entitled to claim the estate preferably to the pursuer. June 20. 1825.

It is very difficult to see what difference the charter 1742 makes, if it is true that the same persons are called as by the original entail. For if the fact be, that if no new investiture had been taken, Sir Hew's issue would have taken the estate; certainly, if the investiture is taken in the same terms, they cannot be the worse of it, and it even makes their right surer. For what is to prevent Sir Hew serving heir to John Hamilton, and saying to the jury, 'I am the eldest son of Sir Hew Dalrymple, who was the eldest son of another Sir Hew, who was the eldest son of Joanna Hamilton, and therefore I am the heir of entail next to John Hamilton?' Is not the propinquity in terms of the taillie justified? Not that he is heir simply to John Hamilton, but that he is heir of taillie and provision to him. But Mrs Fullarton does not limit the flexibility of the terms 'heirs whatsoever' to a reasonable extent, but wishes you to think that John Hamilton meant something equivalent to an express exclusion of Sir Hew and his issue. She says, that he could not mean to bring him in again, if they had once been excluded. But really I don't think that John Hamilton had any idea that they were excluded. He was aware of the terms of the deed of repudiation, and the qualification contained in it. He durst not have taken the investiture in other terms than he did, so as to have excluded them; because he was explicitly, by his own acceptance of that deed, barred from doing any thing which would have had that effect; and if he had done so, it would have been reduced.

I therefore cannot go into the idea, that, in a competition of brieves, it would be found that the destination in the charter 1742 was exclusive of a service by Sir Hew. But suppose it were exclusive of Sir Hew, what is all that to the purpose? And here comes in prescription, so far as regards Sir Hew's right to reduce the charter 1742. With respect to those rights competent to all the substitutes under an entail, the minority of one of them will not operate to stop prescription: we found the contrary in this case, but it was altered by the House of Lords. But it has no application to this case, as it applies only to those rights which are competent to all the substitutes. It has nothing to do with the individual rights of one substitute or class of substitutes. The plea there is founded on the allegation, that the

June 20. 1825. whole proceedings are contrary to 'my' rights to the estate, that being an individual claim. It is quite different from cutting down contravention, which is competent to the whole substitutes. Unless prescription, therefore, has run against the defender as an individual, he must be heard. I take it for granted that old Sir Hew had no children at the time of the decree, as they are not called. Now, take away twenty-one years from the interval between 1742 and 1796, when John Hamilton died, and there is no prescription; and after that prescription could not run, as the present Sir Hew got into possession by the deed 1780. He had thus two rights; the one under the entail 1688 to reduce the investiture 1742, and the other as the true heir-apparent to John Lord Bargany, out of whose hæreditas jacens the procuratory of resignation had unwarrantably been taken. When a man has two titles, he cannot prescribe on the one against the other, except where there are limitations of entail in the one and not in the other. Now, Sir Hew had nothing to gain by reducing the investiture 1742, as he had possession of the estate, unless you are to hold that a man must bring an action though he is to gain nothing by the decree. If your Lordships find that the investiture 1742 gives the estate to this lady, then the deed 1780 was certainly ultra vires. But I agree with our brethren who have been consulted, that the defender would be entitled to serve in preference to Mrs Fullarton, and that he has a title to reduce the title 1742, but that there is no necessity for his doing so, as he is already in possession.

Lord Craigie.—It is with regret that I differ in opinion from so great a majority of my brethren; and I wish that what I am now to state should be considered rather in the light of an apology for myself, than expressing or indicating an expectation that it can have any weight in the determination of the important cause now depending.

The entail of the estate of Bargany, prepared a few years only after the enactment in 1685, contains all the forms required to render it complete, so far as relates to sales, and encumbrances, and alterations of the succession.

Besides those clauses which were particularly in the view of the Legislature, it contains a declaration, or condition, out of which the present question has arisen.

It is in these words:—'That the haill heirs of taillie above-mentioned, as well male as female, and the descendants of their bodies, who shall happen to succeed to the said lands, baronies, and others foresaid, according to the foresaid destination, or

‘by virtue of the said writ spart sua to be granted by the said John Lord Bargany, shall be obliged to assume, use, and bear the surname, arms, and designation of Hamilton of Barganie, as their proper arms, surname, and designation, in all time thereafter.’ June 20. 1826.

This condition might have been enforced by an obligation to denude, or by an ordinary clause of devolution, directing that, in the case of the heirs succeeding to an estate or title, requiring them to assume the name and arms of a family different from those of Bargany, these lands should fall to the next heir or substitute; or that, where the right to two or more of the family estates would otherwise belong to the same heir or member of the family, a similar devolution should take place,

But instead of this, and in proof of the *enixa voluntas* of the entailor on this head, the sanctions of the enactment in 1685 are applied; it being provided, ‘That if any of the said heirs of taillie, male or female, or the descendants of their bodies, who shall happen at any time hereafter to succeed to the said lands and others foresaid, shall do in the contrair hereof, then, and in that case, the said heir of taillie, male or female, and the descendants of his or her bodies, sua contravening, shall ipso facto amit, lose, and tyne their right, title, and succession above specified, to the said lands and others above-mentioned; and the samen in the case foresaid shall ipso facto fall, accrese, and pertain to the next heir of taillie who would succeed if the contravener and the descendants of his or her body were naturally dead.

‘And it shall be leisome to the next heir of taillie to establish the right thereof in his or her person, either by adjudication, declarator, or serving heir to the person who died last vest and seizedt herein preceding the contravener, (and that without being liable to the contravener his or her debts or deeds), or by any other manner of way consisting with the laws of this kingdom;’ and then the heirs so succeeding are obliged to bear the name and arms under a similar irritancy.

In this manner, where the heir entitled to the succession refuses or abetains from using the name and arms, the next heir of entail may proceed in four different ways or forms, all of them authorized by the entailor, who in this respect had the most unlimited power, his heirs of entail not being his heirs of line:—
1st, By obtaining a decree of adjudication, whereby, on evidence of the fact of refusal or abstaining, the estate should be declared to belong to the next heir. 2^d, By a simple decree, without a

June 20. 1625. conclusion for adjudging, the right of the contravener might be taken out of the way, so as to open the succession to the next heir, though it might not vest the estate in him. 3d, By a service as heir of tailie and provision, rested upon the provision of the entail as to using the name and arms, and proof of the fact of refusal, the next heir, whether the second brother of the contravener, or any other individual not descending of the contravener's body, might come in. And *lastly*, and generally, The same thing may be accomplished by any form or legal proceeding, authorized by the common law and practice of Scotland in the case of conditional grants of lands; or, in other words, by an ordinary action ascertaining the fact of refusal, and the consequence of it in favour of the next heir.

In all these different ways the next heir became the *stirps* or root of a new order of succession, leaving out the contravener and his descendants, it having been provided, in this case, that the contravener should forfeit for them as well as for himself.

Besides the clause already quoted in reference to the condition of using the name and arms, there is a general irritant and resolutive clause which applies to all the conditions of the entail.

As to the remoter heirs or substitutes, there seems to be no doubt that they might in this, as well as in all similar cases, take the same measures for the purpose of putting forward the succession, and so promoting their own interests. Indeed it was for some time thought, that, without a special clause, the descendants of the contravener's body were excluded *ipso facto*, in virtue of their ancestor's forfeiture. Fount. 6th January 1697, Simpson. But where such exclusion is directed by the entail, there cannot be a doubt that, wherever an heir has contravened, his descendants must be liable to, and involved in the same forfeiture.

It is by this entail only that both the parties to this litigation must claim a right to the lands of Bargany. The heir-at-law of the entailer was different from either of them. If the limitations had not been enforced against William Lord Bargany in the end of the seventeenth century, when the entail was duly recorded, the estate would have gone to his daughters, or might have been attached by his creditors.

There is here no question with the creditors of the heirs of entail. It is entirely between the heirs themselves, where the will of the entailer is the sole and governing rule, and to be followed out in the same manner as in a testamentary settlement

June 20. 1825.

or latter will, according to the entailor's purpose and determination, wherever it can be discovered with sufficient certainty.

It is in this view that the later decisions in the cases of Roxburgh and Queensberry appear to be of great importance. But there is one of a more early date, (20th of January 1790), Henderson, affirmed in the House of Lords, in which the distinction here pointed out was acted upon in the most correct and perspicuous manner. There the clause of devolution was unconnected with the prohibitory, irritant, and resolutive clauses of the deed; and the case provided for was that of the heir of entail for the time in possession of the lesser estate succeeding to the larger one, whereas the species facti was the reverse; and it was contended, that, according to the strict interpretation of entails, there was no room for a devolution, or the operation of an obligation to denude: But the answer was, that where the question was merely which of two heirs should succeed, 'the testator's will was to be judged of according to the same rules that are employed in the interpretation of any other deed or contract, upon a complex view of the whole, and consideration of the object in view.'

It is also to be observed here, that in the case of conditional grants in the form of entails, there is, properly speaking, no *persona prædilecta*. From priority of birth, or other circumstances, one heir is preferred to another. But where that heir does not perform the conditions of the grant, it is as clearly meant that he and his descendants shall lose the estate, as it is that he and they should have it while he observes the conditions. And if, in any instance, a Court of law were to interpose by relaxing the conditions of the settlement, they would not only disregard the will of the testator, but make a will for him different from that which he has made.

It would be a fatiguing task to analyze the different deeds, and to detail the various proceedings. I shall only offer two observations in regard to them:—

The first is as to the explanation of the supposed views of John Hamilton and his elder brother, the late Sir Hew Dalrymple, as appearing from their various transactions. It was most natural for John Hamilton to use every precaution for the benefit of his elder brother's family that was not injurious to his own interest; but it clearly enough appears, and is to be presumed, that he meant to do nothing that could endanger his own right to the estate, or the rights of his children, if he had any. Holding this to be a just view of the intentions of the parties, and not

June 20. 1825. imputing to them any fraudulent combination or concert to injure the other heirs of entail, it seems not difficult to explain the tenor of their proceedings.

The second observation applies to the defender's proceedings since the late remit by the House of Lords. He was thereby authorized to bring any action he might think fit, for reducing the decree in 1741, the retour of service in pursuance of that decree, and the charter and infestment in 1742. This, however, the defender has not done: Neither has he attempted to make any new title or investiture. He stands upon his defence, resting upon the titles made by John Hamilton, and upon the conveyance from him in 1780, and upon the infestments following upon that conveyance. And upon the titles and investitures so approved of and ratified by him, his defence, as it appears to me, must, and ought to be judged of.

I shall now proceed to state what has occurred to me with regard to the law of the case, beginning with what is certainly a preliminary point, and, if decided in one way, exclusive of and foreclosing every other; which is, that in consequence of the proceedings in the former litigation, the pursuer has no right to maintain any of the pleas or arguments now suggested. Upon this point my opinion humbly is, that the plea is not well founded.

The pursuer's grounds of action and reduction now insisted in are not, as in the former litigation, that the deed of repudiation, as it is called, was an alteration of the course of succession prescribed by the entail: The pursuer now contends, that whatever the motives and purposes of the parties, as to the deed of repudiation, were, it did not effect an alteration of the succession, but enabled the pursuer, in due time, and in her proper place, to claim the succession as she now does.

Again, the pursuer's plea is not, that John Hamilton, by making use of the deed of repudiation, without declaring an irritancy against his elder brother Sir Hew, committed an act of contravention against the entail.

Her plea is, that the deed already mentioned, along with those which followed, when duly and attentively considered, was not an act of contravention of the entail, but, on the contrary, might be of some use, although it was not necessary for enabling the pursuer to enter her claim agreeably to the entail; John Hamilton's elder brother and his descendants being thereby excluded, and the estate transferred to John Hamilton, as the next heir of

entail, in consequence of the failure upon the part of Sir Hew to comply with the conditions of the entail. June 20. 1825.

Neither does the pursuer now contend, that the charter and sasine obtained by John Hamilton in 1742 were null and void, by bringing back the estate, on the death of John Hamilton failing issue of his body, to his elder brother Sir Hew, and his descendants. In direct opposition to this, the pursuer being more correctly informed as to the nature of her rights and claims, maintains, that the charter and infeftment in 1742 are complete and operative deeds, not restoring to Sir Hew and his children the estate from which they had been excluded, but conveying it, in the existing circumstances, to the pursuer, as the party truly entitled to it, in the same manner as if Sir Hew and his descendants were no longer in existence, or had never existed.

In short, the question formerly tried was, whether the pursuer could obtain a decree of irritancy against John Hamilton, in consequence of the proceedings which have been so fully detailed.

The question now is, as to the true meaning and effect of these proceedings; and whether the late Sir Hew Dalrymple, and the defender, as his descendant, were thereby excluded from the place originally assigned to them by the entail of Bargany? and if so, whether the pursuer is not entitled, of necessary consequence, to set aside the deed in 1780, and all that followed upon it?

It would, indeed, have been singular, if the noble and learned Lords who concurred in the judgment pronounced in July 1822, (and one of whom had also concurred in pronouncing the judgment in the House of Lords in the action formerly depending), had required the Court of Session to try points which, by the former judgment, had been finally and irreversibly determined.

At all events, it appears to be highly becoming, that, from respect to the judgment and remit from the House of Lords, we should give our deliberate opinion on all and each of the questions therein suggested.

Dismissing, therefore, this preliminary plea, and proceeding to the merits of the action now depending, the first object of inquiry is the effect of the law of prescription on the rights of the parties.

If the present discussion respected the right of property vested in John Hamilton, in virtue of the charter and infeftment in 1742, in a question with third parties not interested in the succession, it humbly appears to me, that the right of John Hamilton would be held complete and impregnable.

June 20, 1825.

If John Hamilton, until his death, had continued to possess the estate upon the charter and infeftment in 1742, this does not appear to be seriously disputed. But the deed in 1780, it will be remembered, made no alteration in the fee and property of the estate, as held by John Hamilton upon the charter and infeftment in 1742. By that deed, if John Hamilton had left issue, the defender and his family might have remained for ever excluded from the succession. Until John Hamilton died, the defender had no immediate or tangible right in the property of the estate; he had only a hope or chance of succession, not opening to him at all until John Hamilton died, and not even then, if John Hamilton left children.

It would be most injurious to the land rights of Scotland, if the mere destination of an estate by a party, in favour of his apparent or presumptive heir, or of any one who, in any possible event, might succeed, could interrupt a prescriptive title begun and nearly completed.

A separate and quite different question arises, as to the effect of prescription applied to destinations of succession in lands limited by entail. If such destinations be agreeable to the entail, they can be of no use. If they are contrary to it, they can have no effect until they have been acted upon, in consequence of the succession opening to the individuals favoured by the new destination. More especially, they cannot, at any previous period, create any right to the lands by the positive prescription. They give no immediate title to the property, which remains in the heir for the time; and they cannot be followed with actual possession, without which the law of the positive prescription cannot in any case be applied with effect. Again, as to the negative prescription, a destination in entailed property, if contrary to the entail, must depend upon the will of the maker of it; and so, while he lives, it must remain a revocable and precarious deed, which no party is called upon to challenge.

In regard to the general law of the positive prescription, it may in this place be proper to add, that a title of prescription, otherwise complete and unexceptionable, cannot be affected or injured by resorting to what are called the grounds and warrants of such title. It is not law, and it would be most unfortunate if it were, that after a possession of forty years, upon a right *ex facie* correct, and followed with infeftment, the property might be carried off, because the import of the conveyance appeared to be contrary to the intention of one of the parties, or both of them, or to some deed or writing in full force when the prescription began to run.

June 20. 1825.

An erroneous adjudication of the estate of Bargany, valuable as it is, would not occasion the hundredth part of the mischief that would arise from the recognition of such a plea. It would be in the very face of the Act 1617, chap. 12., which provides, that a party producing a charter and infeftment of lands granted to him or his predecessors, with forty years' possession, without any lawful interruption, shall not be troubled by any person pretending right to the lands, 'by virtue of prior infeftments, upon any ground, reason, or argument, competent of law, except of falsehood.' By this exception, it is hardly necessary to say, is not meant a false statement, but the use of forged documents.

Supposing, therefore, that the tenor of the retour and decree of declarator and deed of repudiation had been erroneously recited, or that such writings had never existed, or were in themselves void and null, still, under the Act 1617, so highly valued in giving security to real estates in Scotland, any party having right to the charter and infeftment, accompanied with uninterrupted possession for forty years, would be secured against challenge.

It has been suggested, that, in the circumstances of this case, the parties against whom the plea of prescription is now stated, were non valentes agere cum effectu. But this plea is not good, in general, against the positive prescription. The exception which is made as to minority, proves the existence of the general rule.

In this case, the individuals immediately interested not only did not urge an objection to the title when they had an opportunity, but pleaded upon the writings in question, or at least upon the charter and infeftment in 1742, as establishing in their favour a right by the positive prescription. And this plea, it will be remembered, was in terminis sustained by a final judgment of this Court; and although, in the after proceedings, the discussion went upon other points, and chiefly upon matters of form, there was nothing to shake the authority of the general finding as to the effect of the positive prescription, founded upon the charter and infeftment in 1742.

Besides, there was here no room to plead non valentia agendi. Sir Hew Dalrymple, as well as his grandson the defender, had, according to the arguments now maintained by the defender, an immediate and important interest to challenge these titles, if they could do so upon relevant grounds. If the former only meant a temporary and gratuitous possession of the lands to his younger brother, he might have at any time put an end to it. In the

June 20. 1825. same manner, if the defender could have shewn that the decree of declarator did not affect his right, but that of his grandfather only, there being, as it has been since alleged, no decree directed against him as the descendant of the contravener, he might thus have obtained an advantage over his uncle and grandfather, and so might have assumed immediate possession of the estate. Instead of this, he concurred in the defence pleaded by John Hamilton, and, after John Hamilton's death, made up a title upon the conveyance from him in 1780; and such is the title of his possession at this hour. But, indeed, not only Sir Hew and his descendants, but the whole other heirs of entail, (with the exception of John Hamilton and his children, if he had any), might have challenged the feudal titles, and the whole proceedings, if not agreeable to the entail.

Upon this charter and infeftment I have farther to observe, that none of the parties interested could, at any time, by any action, and least of all by way of exception, set it aside, unless so far as it was inconsistent with its grounds and warrants. This appears to be the true import of the decision in the case of Drummond, 17th May 1793. In the renewal of an investiture, there had been a mistake in reciting the destination, by leaving out the words 'of the body;' and the heir first called, not being affected by the mistake, expedie a service, in which the error was repeated. But, greatly within the forty years, an action of declarator of reduction was brought by the party who, unless for the mistake, was entitled to the succession, insisting that the mistake should not affect his right, and that a warrant should be given to the proper officer to alter the record, or otherwise that the later investiture should be set aside in toto. The Court, however, did not reduce the investiture, but found it erroneous so far as it wanted the words 'of the body,' and also that the pursuer was entitled to serve herself as heir of provision, in the same manner as if the investiture had been correctly framed; thus in effect finding, that the investiture was only liable to challenge where it was contrary to its grounds and warrants.

It has been farther argued, that John Hamilton could not be held to have acquired by prescription what would be injurious to his own right; and the principle of the decision in the case of *Smith v. Bogle*, and of some later cases, has been appealed to. But by the titles and possession held by John Hamilton, he did not diminish, but create and extend the limits of his right. If he were to be held as an intruder, the result of the positive prescription would have been, not only to establish a title to himself

June 20. 1825.

and his children, if he had any, to a valuable estate, but to enable him, so far as onerous creditors or purchasers could be concerned, to burden and dispoise the lands, as if there had been no entail. What was said in another place on this subject appears to be perfectly correct, that if John Hamilton was not entitled to come in as heir of entail, his right was not affected by the registration of the entail in the proper register. The estate, therefore, would have been withdrawn long before his death from the protection of the Act 1685, although the entail might still remain effectual against him with regard to the other heirs of entail.

On the other hand, if, when John Hamilton was entitled to take up the estate, in consequence of his elder brother refusing to bear the name and arms of Bargany, he had omitted some of the necessary forms,—*e. g.* by not obtaining an express decree of contravention against his brother's descendants, supposing that to be necessary,—it is obvious, that so far as these objections in point of form were obviated by possession for more than the statutory period, under the titles so often recited, John Hamilton certainly lost nothing, but, on the contrary, gained a great deal by the operation of prescription; and if he had left issue, it humbly appears to me, that, in a question with the present defender or his descendants, they would have been altogether secure.

But another argument has been used. Supposing that John Hamilton had acquired a prescriptive right to the estate, it is said that he, and in his right the defender, might depart from the right so acquired; and reference is again made to the cases of *Smith v. Bogle, &c.* where a party having separate titles to the same estate, (some of them limited, and others not), was permitted, in a question of prescription, to ascribe his possession to that which was most favourable to him. But this argument appears to me to have no foundation in law or justice.

It is not permitted to a party in any case, after having acquired a prescriptive right, as appearing from the records and possession, to alter as to third parties the nature and qualities of his right. This would indeed overthrow the most useful purpose of prescription, and would occasion great and endless uncertainty. Particularly, it would not be permitted to John Hamilton, after pleading and obtaining a judgment protecting his right on the ground of prescription, to authorize, by any personal declaration of his, an opposite argument, even although he had in his person at the time a separate title. And it appears to be equally incompetent to the defender, coming in John Hamilton's right, and standing upon the same titles, to maintain such an argument.

June 20. 1825. But John Hamilton had no election between two sets of titles; his right was bottomed upon the charter and infeftment in 1742, as connected with and supported by the entail of Bargany, the retour in 1741, and the previous decree in 1740—all of them specially referred to in the investiture.

Farther, the disconformity in this case between the charter in 1742, and the writings referred to in it, consists merely (as far as I can discover) in the words of the destination introduced in the charter, upon which so much has been said. Whether this disconformity can be objected to by the defender with prudence, the Court may have some doubt. It would certainly relieve the pursuer altogether from the argument chiefly maintained in the former pleadings, by sending back the parties to the import and effect of the previous retour and decree, in which, it will be remembered, nothing is said as to the heirs of entail who are to succeed to John Hamilton, the whole being left, as is usual in such cases, to the original entail and the subsequent investitures, combined with the changes which had been previously made by failure of heirs, or by decrees of contravention, or by prescription. If I were to argue the case as a lawyer for the pursuer, I should be inclined to join issue with the defender on this point, as relieving me from a discussion which appears to have been considered as at least doubtful, if not unfavourable to her. Our duty, however, as Judges, is to decide upon the rights, rather than upon the pleadings of the parties. It is, therefore, necessary for me to consider the question in both points of view; and deeming it respectful to my brethren to begin with that which seems to have met with their approbation, I will now proceed to consider, in the first place, what the rights of the parties would be, taking out of view altogether the charter and infeftment.

As to the retour, it was thereby found, that John Hamilton was the lawful and nearest heir of taillie and provision to James Lord Bargany; and reference is made to the entail of Bargany—the judgment of the House of Lords in the competition between Sir Hew and the heirs of line—the deed of repudiation, as it is called, by Sir Hew Dalrymple in 1740—and the decree of declarator in 1741; by which, upon a reference to the same documents, it was found, that he had the only right and title to the succession of the estate of Bargany, and that he ought to be served heir of taillie and provision to James, the last Lord Bargany, who had made up a title by general service under the entail, but had not completed his title by infeftment.

It was upon these titles that the charter and infestment in favour of John Hamilton were completed, he having for that purpose resigned upon the unexecuted procuratory. June 20. 1825.

It has been objected to this retour, that it was merely a personal deed; but this, as it with great deference appears to me, is altogether erroneous. It is only a personal deed, so far as it affords no immediate warrant of infestment. But while unreduced, and connected with the unexecuted procuratory in the entail of Bargany, and not superseded by a retour in favour of a person having a better right, nor objected to by a person so situated, it forms an essential link or *mid-couple* in all the subsequent rights, whether of property or succession. No subsequent heir of entail could take up the succession without serving heir of tailie to John Hamilton; and no creditor could attach the estate as held by the entail, unless upon a charge to enter heir to John Hamilton. A service to James, the last Lord Bargany, or a charge against any of the heirs of entail to enter heir to James Lord Bargany, passing by John Hamilton, would be of no avail.

It has been farther said, that the retour was null, and might be disregarded, being in favour of John Hamilton, as the second son of his mother Joanna Hamilton, the presumptive heiress of Bargany, although the right of succession was clearly in Sir Hew Dalrymple the elder brother; and for this the case of Lambe, and those of Mountstewart and M'Kinnon have been mentioned; but, as it appears to me, without any relevancy or foundation in law.

It will readily be admitted, that even after the retour of a person in a particular character, or in a certain degree of inheritable relation, there is always room for a retour in favour of another party connecting himself with the investiture in a preferable character, or connected with the ancestor in a nearer degree of relation. In all such cases, the insufficiency of the first retour may be pleaded by way of exception, so as to take away the whole effect of it, if standing by itself, and not followed with a feudal title and possession for forty years. In this way, therefore, if John Hamilton had served simply as second son, it would have been competent to Sir Hew, or any of his descendants, to serve as eldest son, or as coming in the place of the eldest son, and so to acquire right to all property left to the destination of the law, or falling under the settlement to which the retour related. But this doctrine admits of two limitations, both of which apply to the present case; for, first, If upon the retour a charter and infestment had followed, with forty years' uninter-

June 20. 1825. rupted possession, although the retour might be liable to be set aside, or might be rendered ineffectual by a retour in favour of a nearer heir, still the estate would, by the force of prescription, be taken out of the hæreditas jacens, and would be transferred to the party having right to the charter and infestment; and, secondly, In such a case as this, it would not be enough, in order to set aside a retour in favour of a party, as second son of the ancestor, to produce merely a retour in favour of a party designed as eldest son. It would be necessary farther to shew, that the documents referred to in the retour were not sufficient to transfer the right of succession from the eldest to the second son. This, however, the defender, in the present instance, cannot pretend to do. And although he could, it would not be enough, if he was not at the same time enabled to set aside the charter and infestment following upon the retour; which he has not done, nor attempted to do.

In the case of Lambe, a service had been fraudulently obtained by a second brother, in the absence of the first-born. In the case of Mountstewart, a party had been served as the nearest heir at the time, although it was objected that there might be a nearer; but this was done under a reservation in favour of the nearer heir, if he should exist. In the case of M^cKinnon, where the circumstances were similar, the service appears to have been taken out without notice; but the nearer heir existed, and was most justly preferred. But in none of these cases had a prescriptive title been formed by a charter, infestment, and uninterrupted possession for more than forty years; and they differ most essentially from the present one in this, that unless the proceedings previous to the retour, as well as those after it, are to be disregarded and held to be void and null, John Hamilton, though younger than Sir Hew Dalrymple, must be considered as the nearest and lawful heir of tailie and provision in the estate of Bargany.

But, supposing the retour in favour of John Hamilton to have been originally liable to challenge, this has been removed, not only by what is called the vicennial prescription of 1617, but by the general enactment of the same year, in which, besides introducing the positive prescription, it is provided, 'That all actions competent of the law upon heritable bonds, reversions, contracts, or others whatsoever, shall be pursued within the space of forty years after the date of the same.' There follows, no doubt, an exception as to reversions contained in the body of the infestments to which they relate, and recorded in the proper register, and also

June 20. 1825.

as to actions of warrandice, which only prescribe from the date of eviction; and, in practice, the latter exception has been extended to all cases where the party having a right could not pursue with any beneficial effect. But here it has been already shewn, that if the decree upon which the retour proceeds was not warranted by the circumstances of the case, not only Sir Hew Dalrymple, but his descendants, (as well as the remoter heirs of entail), might have with effect, and great present advantage, claimed and regained possession of the estate.

It has been said, however, as to the vicennial limitation, that it does not apply to the case of a challenge brought by the party retoured; and in proof of this reference has been made to the case of Lady Edinglassie, 11th July 1701,—and it seems to be inferred, that if such challenge was competent to John Hamilton, it must also be competent to the defender as coming in his right. But this statement has arisen from a mistake, in omitting the final determination on 11th July 1702. After stating the determination then given, Lord Fountainhall gives the species facti, being that of an infant served heir only to convey a right of superiority, and having no benefit by it, and never having heard of it until a claim was brought for a large sum against the party served upon the passive titles, which were only proved by the retour. In what manner this determination could be of importance in the present case, it is not easy to see. John Hamilton was not a minor, but of full age, and a lawyer by profession. He took benefit from the retour, so far as by it, joined with the relative writings, he attained and enjoyed, while he lived, the rents and privileges of the estate of Bargany. Moreover, he made the retour a part of the investiture, under which he enjoyed the rents for more than half a century. In such a case, therefore, it cannot be imagined that John Hamilton could be allowed to challenge the retour. And if he could not do so during his life, it appears to me, with great deference, that, especially after the lapse of more than twice forty years, it cannot be set aside or challenged by any other party, however injurious or prejudicial to his right it may be.

But supposing, for a moment, that the retour of John Hamilton were liable to challenge, or that it were already set aside, it would still remain to be considered, whether, under the decree of declarator in 1741, independently of the retour and charter and infeftment, the pursuer would not be entitled to establish in herself a proper title to the estate, in the same manner as John Hamilton could have done. It will not be said that the decree

June 30. 1825. has been lost by the negative prescription, because it was mentioned in all the proceedings, and in the investitures, down to 1780; and if the retour of John Hamilton, and the charter and infestment in 1742, were to be set aside, or held as null and void, without any reductory action, the decree would be considered as the title, and the only title, upon which John Hamilton, until his death, possessed, or could possess, the whole rents and advantages of the estate.

That the pursuer is entitled to the benefit of the decree in 1740, if she is now truly heir under it, does not appear to be at all doubtful. In the important case of *Maule v. Maule* of Panmure, a service secundum decretum arbitrale was advised by eminent Counsel, and recognized as a good title (until it was set aside) for taking up the contents of a bond granted as a surrogatum for entailed property, and destined to the heirs of entail, although eventually the decree-arbitral was set aside or disregarded; and, consequently, the sums mentioned in it could not be demanded.

To the efficacy, however, of this decree, two objections have been stated: first, As to its containing no proper decree of contravention; and, second, As having been neutralized, and rendered of no effect, by the deed of repudiation therein recited. In this manner, a considerable detail becomes necessary, the result of which, if I am not greatly mistaken, ought to go far to remove these objections.

At this period, it will be remembered, Sir Hew Dalrymple, the defender's grandfather, could not hold the two estates of North-Berwick and Bargany for one hour without opening the succession of one or other of them to the next substitute, to the entire exclusion of Sir Hew and his descendants, so far as John Hamilton and the heirs substituted to him were interested. He could not subscribe a receipt for the rents of North-Berwick, nor grant a lease, nor remove a tenant, without using the name of Dalrymple by itself, and omitting that of Hamilton. And if, after being called in an action by the next or any other heir of entail, he did not formally and judicially in his defence assume the name and designation of Hamilton of Bargany, a decree must have passed in effect declaring, that not only he, but his descendants, had lost their place in the succession to that estate, and that it had devolved to the next heir of entail. And after such a decree had been pronounced, and had become final, it could not have been set aside on any change of circumstances.

At this conjuncture, it is to be farther observed, that Sir Hew

Dalrymple, the defender's grandfather, had made up no titles to the estate of Bargany, although by the judgment of the House of Lords, in a competition with the heir-at-law, he had been found to have right to it. At the same time, he had performed no act immediately relating to the estate which it was necessary to challenge or set aside. He had neither sold, nor burdened the lands with debt, nor altered the course of succession,—he had merely failed to comply with the condition of using the name and arms. And it is one of the important points on which I have the misfortune to differ from my brethren, that I must think that, in such a case, the manner of enforcing the will of the entail, instead of being rendered more difficult, was by these circumstances rendered more easy than it would otherwise have been,—it being, as it appears to me, in virtue of the provision in the Bargany entail, just the ordinary case of a conditional grant of lands, where it is only necessary for one or other of the parties having an actionable interest, to obtain a decree, finding that the condition had not been complied with, and therefore that a devolution had taken place.

It appears to me, with the greatest deference, that from the terms of the entail of Bargany, which have been already recited, such a decree was quite enough, without any acknowledgment or repudiation on the part of Sir Hew, to exclude him and his descendants on the one hand, and to admit John Hamilton and the heirs substituted to him on the other.

In this case, there could be no decree of irritancy, properly so called, that is, a decree voiding and annulling the act which had been done in contravention of the entail. It was not in the power of the Courts of law to prevent Sir Hew from using the name and arms of North-Berwick. In the same manner, there could be no proper decree resolving the right of the contravener, if by this were meant a feudal right to the estate. Sir Hew, though declared the rightful heir in the Court of last resort, in a competition with the heir of line, had not proceeded, and could not with safety to himself proceed, to vest in himself the lands in the ordinary way, by service and retour, or otherwise. In such a case, all that was necessary was to have it ascertained in a declarator, upon a full narrative of the circumstances, that Sir Hew had failed to comply, and could not comply with the conditions of the entail, and that the right of succession had therefore devolved upon the next heir. When these proceedings, with the retour already mentioned, are compared with the authority given by the entail, for transmitting the estate from a

June 20. 1825.

June 20. 1825. contravening heir and his descendants to the next heir who was willing to submit to these conditions, I am quite at a loss to see what more could be required or done than appears to have been done.

Let it be supposed that, immediately after, Sir Hew had offered a bill of suspension of the decree, which had been obtained in absence, or that he had brought an action of reduction, what would have been the consequence? If he had said that there was no forfeiture, would it not have been under a designation proving that he had forfeited, or, in other words, had failed to comply with an indispensable condition, by using the name and arms of North-Berwick alone? Again, supposing the same measures to be adopted by Sir Hew Dalrymple's eldest son, or by Sir Hew himself as administrator for his children, and maintaining that there was no decree particularly directed against Sir Hew's descendants, would not the answer be satisfactory, that by the entail of Bargany a forfeiture of the heir at the time inevitably, and in every case, involved the forfeiture of his progeny, near or remote? Could it be denied, that John Hamilton had obtained a decree as authorized by the entail, and that he had been served as heir of taillie and provision to James the last Lord Bargany, in consequence of a failure upon the part of his elder brother to observe the conditions of the entail? And if this would have been held as a sufficient answer at the time, can it be supposed that, at the distance of seventy or eighty years, a different and opposite judgment can be given?

It has been said, however, that in pointing out the ways in which the succession might be transferred from a nearer heir to one more remote, in consequence of a failure to use the name and arms of Bargany, the term 'contravener' is used, which, it is said, implies that a decree of contravention was necessary; but this appears to be quite erroneous. The declaration is annexed to the third mode of enforcing the condition, viz. by serving as heir to the remoter ancestor, and does not apply to any of the rest. It could be of no effect where the party contravening had not been served heir, because, in such case, his debts could not affect the heir of entail. But the term 'contravener' does not necessarily apply to one against whom a decree of contravention has been obtained. In the language of the law, as well as in common speech, a 'contravener' is one who has violated his engagement, or a condition lawfully imposed upon him; and nothing, it appears, with submission, can be more unreasonable, than to suppose that the entailer, by the use of this phrase, in-

tended to undo what he had professed his purpose of doing, in order to facilitate the transmission of the entailed estate from the person not observing, to him who was willing to observe the conditions of the entail. June 20. 1825.

Still, however, it is necessary to bring into view the deed of repudiation, although it will be done with brevity; because, in this respect, I agree with the majority of the Court, that a deed of repudiation, in its proper meaning, could not be binding in favour of the descendants of Sir Hew Dalrymple, or against them.

The pursuer was quite correct in stating, that this document was not recorded in the Register of Real Rights, nor in any record for publication; and farther, that it had not been entered in the Register of Entails. It must, however, be admitted, that the deed was recited at length in the summons of declarator, and afterwards, in general terms, referred to in the service of John Hamilton, and in the charter and sasine which followed.

This deed appears to have been intended for two different purposes: first, For declaring, on the part of Sir Hew Dalrymple, that he had determined to reject the estate of Bargany on account of his interest as heir of entail in the more valuable estate of North-Berwick; and, secondly, For reserving to him and his children every right, or claim of right, which might belong to them, consistently with the general declaration which he had made.

Sir Hew Dalrymple mentions, that in case he should then take the succession of the estate of Bargany, he would thereby forfeit his right to the estate of North-Berwick for 'himself and his descendants.'

He then states his determination to take and hold the estate of North-Berwick, and to allow the estate of Bargany to be taken by John Hamilton, 'in terms of the entail of the estate of Bargany,' (*i. e.* as if Sir Hew and his descendants were dead and gone).

'Therefore,' the deed goes on, 'and for the love and respect which I have and bear to the said John Dalrymple, and in consideration of the settlements of the estates of North-Berwick and Bargany above recited, wit ye me, with and under the provisions after mentioned, to have repudiated, likeas I by these presents do repudiate and refuse to accept of the succession of the said estate of Bargany, and that to and in favours of the said John Dalrymple, and the next heir of taillie in the said estate of Bargany; and I consent that the said John Dalrymple

June 20. 1825. ' shall, in respect of my repudiation foresaid, serve himself heir
' of taillie and provision to the said James Lord Bargany, and
' otherwise make up titles in his person, in such manner as is
' competent of the law, and as he shall be advised.'

Thus far the deed admits of no doubt whatever. It merely acknowledges that the granter could not hold both estates. He then goes on to state, as a consequence which could not be disputed, that he was to repudiate, and could not by any possibility avoid the repudiation, of the succession of the estate of Bargany; and he consents to what it would have been altogether in vain for him to oppose, that his brother, the next heir of entail, should make a title in his person, as heir of taillie to the estate of Bargany, in such a manner as was competent in law; or, in other words, in terms of the entail 1688. And if this had been done in the words of the entail, that is, either simply to John Dalrymple, alias Hamilton, as nearest heir of entail, or adding, ' whom failing, to the other heirs of entail,' it is not easy to see where there could have been room for an argument.

But after this follow the words, ' Providing always, that these
' presents shall nowise prejudice my own or my descendants our
' rights to take the succession of the said estate of Bargany, upon
' failure of the said John Dalrymple, and Dr Robert Dalrymple
' my third brother, and their descendants; or in case any event
' shall exist in which I or my descendants can take the succession
' consistent with the taillie of North-Berwick; and under which
' express condition thir presents are granted by me, and accepted
' by the said John Dalrymple.'

It will be observed here, that Sir Hew seems to have considered the exclusion of his descendants from the place originally assigned to them by the Bargany entail, to be just as complete as his own; and this is proved by his after conduct, and that of his descendants. He did not conceive it possible that, after he had given up his situation as the eldest son of Joanna Hamilton, either he or his descendants might, at some future time, resume their place, as if there had been no decree of declarator against them.

Neither did John Hamilton, by accepting of this deed, acknowledge any right in the person of Sir Hew Dalrymple, or the descendants of his body. As he was to take up the estate of Bargany in terms of the entail, in the only way which he could do so, by the exclusion of his elder brother and his descendants, he could not, without a forfeiture of his own right, agree at any time to undo what had been done, and to restore to them the right

June 20. 1825.

which had, agreeably to the entail, devolved to him, and to the heirs substituted to him. But events might occur in which, with the most accurate observance of the entail, Sir Hew and his children might have become heirs of entail; and in such events, it was highly proper that the interests of Sir Hew and his issue should be kept entire.

Such a reservation might enable Sir Hew and his children, as the representatives of Mrs Duff of Crombie, to take the estate, when all the prior heirs had failed, or had been excluded by such a decree as John Hamilton obtained, or certainly might have obtained, against his elder brother and his children. Again, after the failure of all the special substitutions in either of these ways, these parties might succeed, under the last substitution, as 'heirs-female of the entailer without division.'

Such events had been provided for by a special clause in the North-Berwick entail; and it might be thought expedient, by the reservation, to obviate all disputes on the subject with regard to the estate of Bargany. At the time this was no unimportant matter. In the case of *Simpson and Others v. Home*, 6th January 1797, it was decided, that an heir of entail, after having once forfeited in consequence of his own act, could never again be admitted to the succession: And this was the opinion of Lord Bankton, B. ii. tit. 8. § 145. although the law seems now to be otherwise settled. It is to be noticed farther, that the deed is subscribed by Sir Hew, bearing the name of Dalrymple only, without that of Hamilton.

Here it may be again admitted, that most assuredly the granter of this deed could not repudiate for his descendants. But we are not to take the intent and force of a deed from the title of it; and because words of repudiation are used, which were altogether ineffectual against the subsequent heirs of entail, we are not prevented from taking into our consideration those statements in point of fact which are contained in the same deed; neither are we to disregard the real evidence which arises from the form of the deed, and from the subsequent conduct of the parties. Sir Hew most specifically and distinctly states as a matter of fact, his situation as heir under the two entails; the impossibility of his holding both estates; and his fixed determination, to which he adhered as long as he lived, not to comply with the conditions of the Bargany entail, but to allow that estate to be taken up (which it was not in his power to prevent) by John Hamilton, his immediately younger brother, in terms of the entail, whereby not only Sir Hew, but his descendants, were expressly excluded

June 20. 1825. from the succession, and John Hamilton, as the next heir of entail, admitted. But that is not all: Sir Hew affixes his family name to the deed, which is duly attested, and not using the name of Hamilton, and his signature is produced and made a part of the writings referred to in the decree.

As to the reservation which is contained in the same deed, it appears to me, upon the same grounds which have been adopted by the majority of the Judges with regard to the act of repudiation itself, that it cannot affect the heirs of entail subsequent to John Hamilton, and representing him only as heirs of entail. Interpreting the deed as the defender wishes, the case appears to be the same as if John Hamilton, in consequence of his elder brother's repudiation of the estate, had granted bond for L. 50,000 or L. 100,000, and had inserted the bond in all the different writings while he possessed the estate. This bond would not have been effectual against the heirs of entail, although, in consequence of it, a greater facility might have been afforded to John Hamilton in completing his title to the entailed estate. But this was not the case. It is manifest that Sir Hew had not the colour of a defence against the action brought against him by John Hamilton; and he could not have offered a defence that could be listened to, without exposing to danger his title to the preferable estate of North-Berwick. But, in fact, the deed so often mentioned, when duly considered and combined with the situation of the parties at the time, contains nothing which could prevent the decree in which it is mentioned from being obtained.

There still remains another view of the case, viz. on the supposition that the charter and infeftment in 1742 were not null and void, but still formed an important and operative part of John Hamilton's right to the estate.

This investiture, it will be observed, the defender must hold either to be effectual or ineffectual. He cannot be permitted to use or reject it, as it may suit his purpose for the time.

Again, if the defender objects to the investiture as disconform to its warrants, he must give up all argument upon the clause of destination that is to be found in it. So far as appears, it is only disconform to its warrants—viz. the entail of Bargany, the decree of declarator and retour—in this, that instead of naming John Hamilton only, it contains a destination to John Hamilton's descendants; and after they have failed, 'to the other heirs ' whatsoever of the body of the said Dame Joanna Hamilton, ' procreate between her and the said Robert Dalrymple, without ' division; whom failing,' &c.

If these words were omitted, there could be no room for doubt. June 20. 1825.
The excluded issue of Sir Hew Dalrymple, who was himself excluded, could never take, as heirs substituted by the entail to John Hamilton and his descendants.

It seems hardly possible to dispute, that the expression of 'heirs whatsoever' is flexible; indeed more so, in its general acceptation, than that of 'heirs and assignees;' and the addition 'of the body,' which follows in this case, can make no difference where both claimants are heirs of the body.

The words here used are the same in import as if the destination had been 'whom failing, to the nearest heirs of tailzie and provision called by the deed of settlement in 1688,' which, in general, might let in those who were descendants of the body of Joanna Hamilton before the pursuer, but certainly not any individual who had been previously excluded by such proceedings as are warranted in the clause already quoted from the entail.

In the case of *Wedderburn v. Messrs Colvilles of Torryburn*, in 1781, where there was an ordinary decree of irritancy and adjudication, on the ground of the defenders having sold part of the lands and burdened the rest, it was found, in terms of the summons, 'That the entailed estate pertained and belonged to the pursuer and the heirs of her body; whom failing, to the other heirs of tailzie, according to the order therein specified.' This case was conducted by Sir Ilay Campbell and the late Lord Meadowbank, then at the Bar; but it was never imagined, that if the pursuer and the heirs of her body were to fail, or should in their turn suffer a decree of irritancy, the estate was to go, not to the heirs of entail substituted to them, but to those who had been formerly excluded. The words were used, as we say, *applicando singula singulis*; that is, their meaning being adapted to the state of the parties, and an exception necessarily implied with regard to those who had been excluded by a decree of declarator, and who, by the entail itself, are placed in the same situation as if they had never existed.

In such a case, there is hardly occasion to resort to the general rules of construction. It will only be observed, that in our practice a greater latitude is allowed than perhaps in any other country. Besides the explanations which arise from different parts of the same deed, we are accustomed to interpret one deed by another, not only where the former expressly or by necessary implication refers to the latter, but where the one creates or conveys a right that is subordinate or inferior to the other.

Besides this, feudal rights may be governed by considerations

June 20. 1825. arising from the state and condition of the parties interested. A conjunct fee to two persons, otherwise unconnected with each other, gives a joint right *pro indiviso*; but if such right is given to a man and his wife, the fee is understood to be in the husband, the wife being only a *liferenter*. But this general rule may be obviated by particular circumstances; as, for instance, where the heirs of the wife are immediately substituted to the conjunct fiars, or where the property originally came from the wife.

So, where a right is taken to a husband and wife in conjunct fee and *liferent*, and to the heirs of the marriage in fee, the husband is *fiar*, the wife *liferenter*, and the heirs only substitutes. In the same manner, in the case of a disposition in favour of a father in *liferent*, and to the heirs to be procreated of his body in fee, the *liferent* granted to the father resolves into a fee-simple, so that he may sell or burden the lands.

In such a case as the present, therefore, in consequence of the express reference to the entail of Bargany, and the different documents which have been mentioned, if there be an ambiguity, the charter and *infestment* can have but one construction and effect—Sir Hew and his descendants being excluded, and the remoter substitutes called in their order.

In this case, there are circumstances which seem to leave no room for doubt as to the intention of parties, although there may be a latent ambiguity arising from certain circumstances not explained, or not fully explained, by the deed itself.

If a person were to dispoise his estate to his 'nephew Thomas,' when he had two nephews of the same name, the conveyance might *prima facie* be thought favourable to that nephew who was nearest by inheritable relation to the maker of the settlement; but if that nephew had become an alien, or had been attainted for high treason, or in any way rendered incapable of succeeding, the result would be different.

And the case would be still stronger, if the maker of the deed or settlement were prohibited, under a penalty, from conveying his estate to one of his nephews, or obliged by some special covenant to denude, or to allow it to descend to the other. It is needless to say how this illustrates the present case. If by the charter and *infestment* in 1742 it had been declared in express terms, that, upon the failure of John Dalrymple and his descendants, it should not go to the next heir of entail substituted to him, but to his elder brother Sir Hew Dalrymple, not only the destination would be ineffectual, but John Hamilton might have been exposed to the loss of the estate by a decree of contravention.

But the question must here be decided as if it had occurred in 1742; the terms of the deed, if ambiguous at the time, continuing in the same state until the present action was brought. And if John Hamilton in 1742 had been challenged for introducing such a destination as here occurs, his only satisfactory defence would have been by stating, that the words, when taken in their proper sense, could only let in those who might succeed as heirs of entail, and in the order of the entail as affected by the previous proceedings, and therefore exclusive of his brother and his descendants: And if such would have been necessarily the terms of John Hamilton's defence at the time, it is not easy to see how, at the present conjuncture, John Hamilton, or those claiming under a gratuitous deed from him, can be in a better or different situation. June 20. 1825.

But it is hardly necessary to dwell on those circumstances. A destination of the succession is not an alteration of the succession, though it may lead to it: It can only become an alteration when it is followed out by a party taking the estate in consequence of the destination. But here nothing followed until the death of John Hamilton in 1796; and whatever has been done since that time, has now been completely brought under challenge; and although John Hamilton is now in his grave, it is unnecessary to say, that any alteration of the succession proposed by him may be set aside.

It is in vain to state, that there was here no decree of irritancy or contravention, in the usual meaning of these words: The question arises from a particular clause, directing the transfer of the estate from one class of heirs to another in a certain event, and where the heir having immediate benefit from the clause has adopted the very course which was prescribed to him by the entail. Here there is no room for avoiding any act which was done by the heir of entail; there was not even occasion for a decree in express words resolving his right and that of his descendants: It was only necessary to have it found, that the right to the estate had fallen by the existence of the condition, and belonged to the pursuer of the action. This would have been the case in a conditional grant of lands unconnected with any entail. And it has in this case been provided, that besides the action competent under a complete and formal entail, the next heir may adopt either the particular forms mentioned by him, (two of which seem to have been correctly followed), or use the common law remedy in such a case.

June 20. 1825. Upon the whole, it appears to me, that by the proceedings held by John Hamilton, which have been considered at so great length, the right of succession to the estate of Bargany was duly taken from the late Sir Hew Dalrymple, and the descendants of his body, and transmitted to John Hamilton and to the heirs substituted to him; and that, at the death of John Hamilton without issue, the estate did not revert to the present Sir Hew Dalrymple and his descendants, but opened to the pursuer, being, in the existing circumstances, the heir of entail substituted to John Hamilton.

Lord Pitmilley.—In considering this cause, which involves the discussion of several nice and important points of law, I found it difficult to form an opinion satisfactory to my own mind, and would find it equally difficult now to express the opinion which I have formed, without beginning by laying down an arrangement of the different points, so as, if possible, to keep every thing in its proper place, and yet to comprehend all the different matters the consideration of which is important in the decision of the cause.

It has been much pressed on the attention of the Court by the defender's Counsel, that Sir Hew Dalrymple is the heir called to the succession by the entail 1688, as heir-female of the body of John Lord Bargany, according to the effect given to that destination by the judgment of the House of Lords in 1739. I think this point has been properly urged. The entail 1688 is founded on by both parties. Whatever, therefore, may be the effect of the consideration, that Sir Hew is undoubtedly the nearest heir under the entail 1688, it is clear that this is the point from which we must set out; and the general question we must put to ourselves is, How has Sir Hew, who is undoubtedly the nearest heir under the entail 1688, been excluded from the succession? The general answer made by the pursuer is, that Sir Hew is excluded by the transactions which took place, and the different titles that were made up, in 1740, 1741, and 1742, and by the possession which has since taken place.

In order to try whether this answer is satisfactory, I propose to consider the case under the four following heads:—

1st, I shall consider whether the deeds and titles in 1740, 1741, and 1742, were, in their own nature, calculated to cut off the succession of the defender's branch of the destination in the entail 1688.

2d, Whether, supposing they were of that nature, they can

have been attended with this effect, unless prescription has followed on them. June 20. 1825.

3d, I shall consider whether prescription has followed on them. And,

4th, I shall attend separately to the question, which of the parties is the heir called by the investiture 1742.

Upon each of these points, after the utmost attention I can give to them, I have come to form my humble opinion that the plea of the pursuer is not well founded.

I. In considering the nature of the deeds and titles in 1740, 1741, and 1742, it is necessary to begin by attending, which I shall do very generally and briefly, to the relative situation of the parties at the time of executing these deeds and titles, and by contrasting the arrangement proposed by the Lord President, the grandfather of the parties, with the arrangement which was actually adopted.

It is important to observe, that there is no prohibition in the entail 1688 against the heirs of Bargany holding any other estate, nor is there any provision to bear the name and arms of Bargany exclusively. The difficulty felt by the parties was not from the Bargany entail, but from the entail of North-Berwick; and in that entail it was provided, that the heir-male of the marriage of Robert Dalrymple and Joanna Hamilton, if there were more sons than one, and if Bargany should descend to the heir-male, should have no right to North-Berwick, which should go to the second son; but if there should only be one heir-male of the marriage, or so often as this should happen, this single heir-male 'shall in every degree of succession, and as often as this shall 'happen,' have right to both estates. Here, then, there was no provision in favour of the heirs-female in the Bargany entail. The only person interested, at the time when the succession opened, to enforce the condition in the North-Berwick entail, was John Hamilton; and it must have stared him in the face, that in the event of his and his brother Robert's failure without issue, his elder brother Sir Hew, or if Sir Hew left an only son, such son would be entitled to hold both estates; so that what the parties had to provide for was, that if there should be two sons of the marriage, the estates of North-Berwick and Bargany were to separate, but if only one heir-male, by the failure of John and Robert, both estates were to go to the heir-male.

We must next attend to the arrangement which, to carry into effect these provisions in the North-Berwick entail, was in the contemplation of the Lord President. Your Lordships observe,

June 20. 1835. that, before the succession opened, the Lord President had executed certain deeds in 1736, on this narrative, 'That it is for the interest of both families that the said Hew Dalrymple be enabled so far to accept of the succession to the estate of Bargany as to be served and returned heir of tailie to that estate, and thereby to be in a condition to denude himself thereof in favour of the next person called to the succession by the tailie of the said estate of Bargany; which is the most regular and effectual manner of conveying the said estate in favour of the next person in the line of succession by the tailie of the said estate of Bargany.' And accordingly he made an appointment, by which he ordained his grandson to divest himself of his right in favour of John Dalrymple, and so on.

If this arrangement had been carried into effect, there would have been a devolution of Bargany, such as took place in the case of Earlsall, referred to by one of your Lordships, where the obligation in the entail was to make up titles, and convey to the second son. But this arrangement was not carried into effect; and it is impossible for the pursuer to found on it, because it was departed from. It is not so much as mentioned in any of the deeds, except in the factory to Craig.

But it is important to contrast this arrangement with the arrangement which was actually gone into. For, instead of Sir Hew serving himself heir to Bargany, and denuding himself of the estate, a plan very different in its legal consequences was adopted.

First, Sir Hew executed the deed of repudiation of 13th August 1740, which, it must be kept in mind, is the foundation and groundwork of the title to the estate that was afterwards completed in the person of John Hamilton. It is a deed of repudiation of the succession for himself, and for himself alone; and contains the important provision, which has been improperly called a reservation of the right of his heirs, which he could not touch, and also of his own right in certain events. This deed of repudiation was the foundation of the decree of declarator; and is engrossed at full length in the summons which laid the foundation for the decree of declarator, and in the decree itself. It is a decree proceeding on the deed of repudiation alone, and the provision therein contained as its groundwork. The decree not only engrosses the whole of the deed of repudiation, but, as already observed by one of your Lordships, it pronounces decree in favour of John Hamilton, 'after the form and tenor of the writs before narrated.' It is impossible to stretch this decree

June 20. 1835.

to any farther effect than the decree itself bears. It is impossible to look on the grounds on which it proceeded, which are engrossed at length in it, and to say that it could have any farther effect than that John Hamilton should be served heir in consequence of the deed of repudiation, and under the provision contained in that deed. John Hamilton did not attempt to enforce the deed 1786 against his brother; he was content to proceed on the ground of the deed of repudiation, and particularly under the provision, not only in favour of the right of the heirs, but even of Sir Hew himself.

This decree in 1741 is the foundation, and the only foundation, of the general service of John Hamilton as heir of tailzie to James Lord Bargany, by which he acquired right to the procuratory of resignation in the entail 1688. His general service is founded on the decree, and the decret again is founded on the deed of repudiation. The retour bears expressly, that John Hamilton is the second son of Joanna Hamilton, and that he is served under the entail because of the deed of repudiation, and only because of the deed of repudiation. Without the decree and the deed of repudiation, there was no ground for the service. It could proceed on no other ground.

There then followed on this service the charter 1742, which, again, must just depend on the previous titles; but I shall say nothing on that at present, as I mean to consider afterwards who is the heir called by the charter 1742.

Now, it must be observed, that this general service of John Hamilton, which was the foundation of the charter 1742, would have been a perfect nullity, if it had been, as now maintained by the pursuer, a simple service as heir, and not qualified by the deed of repudiation. In support of this proposition, I refer to the following cases in the Dictionary, vol. ii. p. 397., voce Succession:—‘An inquest was found to have committed error, in serving a man as heir to a defunct while there was a nearer heir in existence, notwithstanding the nearest heir had renounced all his right and claim in favour of the other. The reason is, that here the inquest did not answer that point of the briev, *quis sit legitimus et propinquior hæres*, and the verdict of an inquest is only *declaratio sanguinis*; and as to the renunciation, it was not in itself a habile conveyance, nor did it proceed a *habente potestatem*, the granter of the renunciation not being served and infeft. Colville, February 1558. Hay v. ———. A general retour will not be sustained where there is a nearer heir in life, though the nearer heir has renounced.

June 20. 1625. 'Haddington, March 1612, contra ———. Though the nearer heir renounce, it will be to no purpose to charge the next apparent heir, who cannot enter while there is a nearer in existence. 'Haddington, 1st December 1609. Dalgleish v. Anderson.' So that it is plain, that if John Hamilton had attempted to serve himself simply as nearest heir, although he held himself out as the second son, it would have been a nullity. He had no right to be served except in consequence of the deed of repudiation, and of the decret following on that deed.

But, without dwelling on the service, I beg to say a few words on the legal character and efficacy of the other titles, in farther prosecution of the inquiry, whether the titles made up are sufficient in their own nature to cut off the right of the defender, and the branch to which he belongs, and to devolve the succession on the remoter heirs.

In considering this point, it is surely of the utmost importance to keep in view, that there is no pretence of an irritancy having been incurred by John Hamilton, and his brother Sir Hew Dalrymple. If these titles and deeds had inferred an irritancy against the Sir Hew who was a party to them along with John Hamilton, and if this had been declared in a regular action, there would have been an end of the defender's claim; because Sir Hew would have forfeited both for himself and his descendants. But every idea of irritancy and contravention is out of the question; and though the whole case is remitted to us, it is remitted with this important point already settled by the House of Lords. The pursuer first began by attempting to set aside, on the ground of irritancy and contravention, these very deeds which she now founds on as the sole foundation of her title. She was advised to bring such action both against Sir Hew and John Hamilton; and in this she failed. The House of Lords have found, that none of the matters alleged in her summons were sufficient to maintain the conclusions thereof, or any of them. The pursuer must be satisfied of this now; and accordingly she founds on these very deeds as giving her a title to the estate, which confessedly does not belong to her under the entail 1688. She first maintained, that these deeds are a contravention of the entail; but she has been beat out of this plea; and now, instead of saying they are contraventions, she acknowledges them as the groundwork of her own title. This is stronger than a mere absolvitor from the action of declarator of irritancy; for the pursuer is now forced to found upon these very deeds. Therefore she cannot maintain that there was any contravention. Now, if

there is an end to the pursuer's case on the ground of contravention, I am at a loss to see the other grounds on which it can rest.

June 20. 1825.

Reference, indeed, has been made to the clause in the Bargany entail, which allows the heir to make up a title by adjudication, declarator, or serving heir, &c. But this is just the common clause in all entails, and to be found in all the style books. It is verbatim copied into the North-Berwick entail,—just the common clause, that when there is a contravention the heirs shall make up their titles in that way. I do not see that it is founded on by the pursuer herself in any other way. She says in her memorial, 'It will be recollected that the entail of Bargany authorizes the next substitute to have recourse to adjudication, declarator, serving heir, or other legal remedy, if the heir of entail in possession of Bargany should contravene the limitations in the taillie.'

I imagine it to be an established point, that the rights of heirs of entail cannot be resolved and cut off without a declarator of irritancy. Erakine, B. iii. tit. 8. § 32. says, 'No substitute in an entail can enter into possession of the entailed estate, upon the contravention of the former heir, without first declaring the irritancy against him;' and Lord Stair lays down the same doctrine, B. iv. tit. 18. § 7.

But farther, if it were granted that the form of the title were sufficient, what is it that has been done? It is conclusively settled, that there has been no irritancy or contravention; and yet the pursuer pleads on these titles, to the same effect as if there had been a forfeiture. This plea cannot be rested either on the words or on the spirit of the titles themselves. It must always be remembered, that all the titles flow from the deed of repudiation, with the important conditions and provisions contained in it. If John Hamilton was allowed to be served heir, and to procure a charter in that character, it was under an acknowledgment that he had an elder brother, and under a condition that the rights of the elder brother and his descendants were saved and secured.

But another ground has been taken. It is said that John Hamilton, the second brother, having been allowed to serve heir and to take a charter, the succession cannot revert. This idea, indeed, seems to be the foundation and the whole groundwork of the pursuer's plea; that because, in some way or other, the second son has been allowed to serve himself heir, there is a legal incompatibility in the succession reverting to the eldest

June 20. 1806. branch, which has been passed over. It is said, that it is of no moment in what way this has been done; that it is the same as if they were all dead and gone; that it is enough to fix on the fact that the second brother served heir; and that he having once been allowed to succeed, the succession cannot revert.

It appears to me, that this part of the case has not been sufficiently attended to, and that due pains have not been taken to ascertain the principles of law which come under discussion. It was held for a long time, that a remoter heir could not be served while there was a chance of a nearer heir existing. It was so decided in the case of *Bruce v. Melville*, 22d February 1677, *Stair's Decisions*: But this decision was altered in the later cases of *Lord Mountstewart v. M'Kenzie*, and *M'Kinnon v. M'Kinnon*. These cases prove, 1st, That a remoter heir may serve at a time when no nearer heir exists; and, 2^d, That he must denude when the nearer heir is born. The case of *M'Kinnon* was a very strong case. It appeared in that case that the remoter heir had been about eighteen years in possession of the estate, and had sold a great part of it, and yet, on the existence of the nearer heir, he was obliged to denude.

Now, in these cases, the remoter heir, who had served, was still alive and in possession, and the great difficulty was to deprive him of a right which he had legally acquired. It was argued that there had been an *aditio hæreditatis*, which could not be defeated by any contingency, upon the rule *semel hæres semper hæres*. Such was the plea maintained, and it is stated in the Faculty Report to that effect.

But in the case of *Melville v. Bruce* it was considered, what would happen if the remoter heir were dead, and a nearer heir had come to exist,—would the nearer heir take the succession, or would it go to the heir of the remoter heir who had served? That point was argued in the important case relative to the succession of an Earl of Leven, which is reported by Lord Stair at great length; but it will be sufficient at present to notice what he says of it in his *Institutes*. The facts of the case were briefly these:—The Earl of Leven had entailed his estate on the heirs-male of his body; which failing, to the eldest heir-female without division; which failing, to the second son of Lord Rothes; which failing, to the second son of Lord Melville, who had married the Earl of Leven's sister; which failing, to the second son of the Earl of Wemyss, who had married Lord Leven's mother. The Earl of Leven left three daughters, who died unmarried. The Earl of Rothes having no second son, David Melville, who

was second son to Lord Melville, took out a brieve for serving himself heir of tailie to the Earl of Leven. The question agitated was, Whether he could serve while Lord Rothes might have a second son? and it was found that he could not. This decision was overturned in the later cases of Mountstewart and M'Kimmie. But it came to be argued on the Bench, what would take place in the event of David Melville taking up the succession and then dying? and, if a second son of Lord Rothes should exist, would that second son, or would the son of David Melville, take the possession? Here is a case for trying the principle as to a taillied succession reverting. I shall now read what Lord Stair says, B. iii. tit. 5. § 50.—‘Many of the Lords were of opinion, that David Melville should enter as heir of tailie, yet so that if the Earl of Rothes, then Chancellor, had a second son, he or his issue would succeed as heir of tailie to David Melville, and neither his own heirs of line, nor the Earl of Wemyss’s second son; because, at the time of David Melville’s death, the Chancellor’s second son would be a nearer heir of tailie to David than his own son, as being of a prior branch of the tailie.’ It appears from the report of the case of Mountstewart, from the decision in which he dissented, that Lord Stair himself was one of the many Lords who thought that the succession would revert, and that the existing second son of Lord Rothes would take it up. No difficulty was expressed from any supposed rule against the succession reverting or ascending. The principle is just this, that in taillied succession the only question in such cases is, what is to be presumed would have been the intention of the entailor? It was presumed to be the intention of the entailor, though David Melville had taken as the nearest heir at the time, yet if Lord Rothes had a second son, that that second son should take the succession in preference to the son of David Melville. Now if this rule can be applied in a case where there is no nearer heir in existence at the time, is it not equally applicable where the nearer heir is prevented from taking the succession by some extraneous circumstance? In the present case he was prevented by the clause in the North-Berwick entail; but when that obstacle is removed, even in his own case, and more so in that of his heirs, the presumed intention appears to be in favour of the nearer heir. I am not, however, bound at present to go into the question, whether you are to find that such was actually the will of the entailor in this particular case; for at present I am merely dealing with the principle, and endeavouring to shew that there is nothing in the idea of the

(June 22. 1825.

June 20. 1825. supposed impossibility of the succession reverting, and that in taillied succession it depends on the will of the entailor. It therefore appears to me, that there is nothing in the nature of the titles, or in the idea that the succession cannot revert, to exclude the defender's succession.

II. But I come now to the second head which I proposed, namely, assuming that Mrs Fullarton was called after John Hamilton and Robert Dalrymple and their descendants; and assuming, that when once the right of old Sir Hew was cut off, the succession could not revert, the next question is, If this can have any effect, unless prescription has run? It is here only that prescription can come in. You must in this point assume, that the titles are in Mrs Fullarton's favour, and then consider whether they can be supported unless prescription has run.

This is a question on which I do not think it possible for us to differ in opinion. I will suppose the Sir Hew who was a party to the deeds to be dead; and that the question is, 1st, If a person, who was not born at the time, can be excluded, unless prescription has run on the titles? and, 2dly, If this can be done, when it is finally settled that there has been no irritancy or contravention?

Now, just suppose that within ten or fifteen years of the deed 1742, (I steer clear at present of any question as to the vicennial prescription), old Sir Hew had been dead, and his son was willing, at all hazards, to take the estate of Bargany, and had contested the matter with John Hamilton, is it not plain that John Hamilton's claim could not have stood for one minute against him? I do not speak at present of the mode or form of making the claim, but of the right itself. If old Sir Hew had been dead, and his son, who was no party to the transaction, had come forward and stated to his uncle that he must give up Bargany, it is as plain as any proposition in law can be, that John Hamilton's right could not have stood.

But I put another case, in order to bring it under the doctrine in Melville's case: Suppose that, within the same space of time, John Hamilton and Robert Dalrymple had failed without issue, and that old Sir Hew had left an only son, (he would have been entitled by the clause in the North-Berwick entail to take both estates), could Mrs Fullarton have stood in his way for a single moment? I apprehend that that son would have served heir to John Hamilton, in terms of the opinion of Lord Stair in the case of Bruce v. Melville, and that there would have been no need of

a reduction, because he was the nearer heir called to the succession, and there was no prescription against him. June 20. 1825.

III. I am of opinion, therefore, that it is quite necessary that this lady's right under the charter 1742, which is assumed in the present view of the argument to have been a valid right, should be fortified by prescription; and if so, let us consider under the third head of my arrangement, how the fact of prescription stands. The infestment on the charter 1742 is dated in September 1742; and in October 1780 John Hamilton was infest on a disposition, by which the estate of Bargany was conveyed to him by Sir Hew Dalrymple by name, and the descendants of his body, failing John Hamilton and the descendants of his body. I shall not here repeat what was stated by Lord Glenlee, and to which I entirely subscribe, with regard to the negative prescription.

But with respect to the positive prescription, it is very true that the disposition and infestment in 1780 did not alter the right of property or possession of John Hamilton; and, therefore, any right which he, or the descendants of his body, had acquired by the charter 1742, had been enjoyed for more than forty years. But is it not very different with regard to the heirs called after John Hamilton? The pursuer is here assumed to have acquired right under the charter 1742 to succeed after John and Robert and their descendants, because the charter 1742 is, in the present state of the argument, supposed to have called her after them, and to have been the title of possession for more than forty years. Now, at the end of thirty-eight years this prescription was interrupted, and John Hamilton possessed thereafter on the infestment 1780, which did not indeed alter his own possession, but put an end to the possession supposed to have been running in favour of Mrs Fullarton, and expressly called Sir Hew after John and his heirs. It will not avail Mrs Fullarton to plead here, that John Hamilton had no right to make the deed 1780. The question at present is, Whether John Hamilton possessed forty years on a title which called her after John and Robert and their heirs? Assuming that the charter 1742 did so, the disposition 1780 did not; and it, with the infestment, was the title of possession after 1780. The parties are here in a reduction of the deed 1780, on the ground of its flowing a non habente potestatem. Surely the prescription necessary for Mrs Fullarton's purpose must have been completed before the date of the deed which she wishes to reduce; and she cannot deny that that deed, with the infestment on it, being a title of possession to

June 20. 1825. John, was an interruption of the prescription supposed to be running in her favour.

I am, therefore, clearly of opinion, that there is no room for prescription; that, supposing the charter and infeftment 1742 to have been favourable to Mrs Fullarton's claim, neither has the negative prescription run against Sir Hew, nor the positive prescription in favour of the heirs supposed to be substituted to John and Robert and their descendants; and that, therefore, the pursuer has no right to reduce the disposition and infeftment 1780.

As to the vicennial prescription, I think I need say little; it can have no effect whatever in the present case. It could only establish a right of a personal nature in favour of John Hamilton. It may have established, that John Hamilton served heir of taillie to James Lord Bargany, in consequence of the repudiation by his brother: but even if the retour could not be set aside on account of the error appearing *ex facie*, it would not advance the pursuer one single step; for the Act 1617, c. 12. makes no difference between the time necessary for prescription, when titles are made up by service and retour, and when they are made up in any other *habile* mode. This is distinctly stated in the opinions of the consulted Judges, to which, without saying more, I beg to refer. The parties ought to have looked farther into the second case of M'Kinnon in 1765. I have already mentioned, that the remoter heir, who had been served, had sold part of the estate, and there was a reduction brought of the sale; and the Court refused to reduce the sale, because they held that he was rightfully in possession at the time, and therefore that his acts were valid. A new action was raised, which you will find stated in the report of the case, for setting aside the service in 1737, and then more than twenty years had run, and yet the vicennial prescription was not so much as pleaded. The reduction was dismissed; and the case went afterwards to the House of Lords, and the judgment was affirmed.

But according to the view I have taken, the question of prescription is not very important, as it can only occur in case of the pursuer having right by the title 1742; and as I think she has no right by these titles, the question of prescription is not important.

IV. I come now to say a few words on the fourth point, which of the parties is the heir called by the destination in the charter 1742, which has been so often recited; and, 1st, Though I think we must be guided by the legal construction of the dispositive clause, and not by the intention of the parties, yet as so much has been

June 20, 1825.

pressed on us as to the intention, I must say a few words concerning it, and I think the intention quite plain. In considering the intention, we must take into view the whole of the deeds and circumstances together, and the relative situation of the parties. It is only by a full and fair consideration of all these that the purpose and intention can be discovered. In the next place, we must consider the intention of the parties, in the particular case of a competition between the pursuer and the defender, on the failure of John and Robert without issue. A great deal has been said with regard to the intention of Robert succeeding on the failure of John and his descendants. But that is not the case for consideration here. We must confine ourselves to the competition between a descendant of old Sir Hew and Mrs Fullarton.

On that point it appears to me, that what I have already said affords clear evidence of the intention of the charter 1742, that, in the event of the failure of John and his descendants, it should be in the power of the descendant of Sir Hew to succeed, if, by the entail of North-Berwick, he was entitled to do so. I shall only observe one single additional circumstance. In the charter 1742, even the claim of Robert Dalrymple (though expressly reserved in the deed of repudiation) is kept out. The lands are simply destined to John, and the heirs of his body; whom failing, to the other heirs of the body of Joanna Hamilton. So that this is an additional proof that the parties intended to call the heir of Sir Hew, in the event of John failing, and to leave it to the descendant of Sir Hew, being entitled to take both the estates, to adjust matters with Robert Dalrymple, if Robert should survive.

On the technical import of the destination in the charter 1742, it does not appear to me that there is any room for doubt. The words, 'whom failing, to the other heirs whatsoever of the body 'of Joanna Hamilton,' I apprehend, quite plainly included, in legal construction, the eldest son of Joanna Hamilton and his heirs. The charter 1742 must be taken by itself in construing the destination in it; yet it is only by conjectures, and inferences drawn from the other deeds, and by extraneous circumstances, that Sir Hew and his descendants can be supposed to be excluded. It will never do to exclude some of 'the other heirs of the body 'of Joanna Hamilton,' because it may be guessed (and even the conjecture I think groundless) that they were intended to be excluded. What was the plea of the pursuer formerly? She said, that by the investiture 1742 'an undue attempt is again made 'by the said John Hamilton, failing heirs of his body, to make

June 20. 1835. ' the said estate revert back to the said Sir Hew Dalrymple, and ' his heirs and descendants.' That was the view she formerly took of it; and I think she was right in that view of it, for it was a charter conveying the lands to Sir Hew, as one of the other heirs of Joanna Hamilton. But I need not enlarge on this point, as I can add nothing to the opinions of the consulted Judges, and of others of my brethren who have given their opinion.

I have therefore only farther to say a few words on the subject of prescription, applicable to this view of the case. If the destination in the charter 1742 be in favour of Sir Hew Dalrymple, it is plain that the prescription, in place of being against him, is in his favour. It fortifies his title; and if he is called by the charter 1742, after John and the heirs of his body, any supposed difficulty as to the succession reverting is quite inapplicable; for Sir Hew, independently of any title under the entail 1688, has a separate and sufficient title under the charter 1742, which is secured by prescription in this view of the case, to which the objection of the legal incompatibility of the succession reverting does not apply.

Lord Justice-Clerk.—As it appears from the information we have of what passed on this case when last in the House of Lords, that some complaint was made, or regret expressed, that the opinions of this Court were not given in such a way as to possess that most Honourable House of the grounds of our opinions, I shall on this occasion state mine, so as not to be misunderstood, however tedious it may be.

It appears to me, that in proceeding to fulfil the duty imposed on this Court by the remit from the House of Lords, it is necessary to attend distinctly to the terms of that remit. Your Lordships know, that after having stated the various proceedings that have taken place in this cause, the judgment of the House of Lords proceeds in these terms:—' Therefore the Lords find, ' that the judgment of this House on the petition of appeal depending before the House on the 3d of June 1801, does not ' preclude or affect the question, whether the appellant is now ' entitled to claim the said lands, according to the title insisted ' on by her summons in the action which is the subject of her ' present petition of appeal; without prejudice, however, to the ' right, if the respondent hath any, under the deed of repudiation ' of the 13th of August 1740; or the right, if any he now hath, to ' reduce the said decret of the 25th February 1741, or the re- ' tour of service in pursuance of said decret, or the said charter ' of the 26th July 1742; or the right, if any he hath, under the

June 20. 1825.

'limitations contained in the said charter of 1742, or under the deed of the 21st day of June 1780, or the infestment of the 24th and 25th October 1780; or under the other charters from subjects-superiors libelled on in this case: And it is ordered, that, with this finding, the cause be remitted back to the Court of Session in Scotland; and that the Judges of the Division to which this cause is remitted do require the opinions of the Judges of the other Division of the said Court, in the matters or questions in this cause: And it is farther ordered and adjudged, that the said cross appeal be, and the same is hereby dismissed this House.'

Although it is obvious that these are not the words used in other late remits, directing us to review the interlocutors formerly pronounced, yet your Lordships clearly understood that such was the true meaning of the House of Lords; and, accordingly, you ordered the case to be argued at full length, and have taken the opinions of the other Judges, which are imbodyed in the unanimous shape now before us.

Before proceeding to the case on which our judgment is to be given, I must observe, that notwithstanding the finding in the remit from the House of Lords to which I have called your attention, that the decision in 1801 does not preclude the question now agitated under the present summons, that judgment established a point, which, as a Judge called on to decide between the parties at the Bar, appears to me of vital importance. With this view, I must look to the terms of the original summons in 1793, which has been furnished to me by both parties; and I must beg your Lordships' attention to one or two of the statements contained in it. I shall not notice the alleged acts of contravention of John Hamilton, in one of which Sir Hew Dalrymple was also charged as concurring, by executing deeds and obtaining the charter 1742, altering the succession, and making it revert; but shall read only those passages that are applicable to Sir Hew Dalrymple. There is this distinct statement:—'And whereas the said Sir Hew Dalrymple did, immediately after this judgment of the House of Peers, assume and bear the surname, arms, and designation of Hamilton of Bargany, and enter into possession of the estate; but, some time thereafter, he not only laid down the surname, arms, and designation of Hamilton of Bargany, whereby he incurred an irritancy, and contravened the foresaid taillie of the estate of Bargany, and in terms of the said taillie forfeited all right and title to the said lands and estate for himself and the descendants of his body, as if they had been naturally dead;

June 20. 1825. 'but also he executed the disposition and deed of repudiation after-mentioned, in favour of the said John Dalrymple, now Hamilton, his younger brother, whereby he altered, innovated, and changed the order of succession appointed by the said tailie, and incurred another irritancy and contravention of the said taillie, and forfeited all right to the said estate, in terms of the said deed of taillie, not only for himself, but for all his descendants, as if they had been naturally dead.' Then the deed of repudiation is recited at full length, and it is called for as a deed against which the conclusions of the action of reduction are laid. I do not mean to state as an argument against Mrs Fullarton, that all these matters are stated in the summons, as indicating what were her views, and the views of her advisers, in regard to the acts of contravention said to have been committed. It is enough to point out, that, with regard to Sir Hew Dalrymple, it is said that he incurred an irritancy, by assuming the name and arms, and afterwards laying them down, and by granting the deed of repudiation. It is no doubt also stated, that he concurred in another deed along with John Hamilton; but I have nothing to do with that at present. But this summons, when proceeding to the conclusions, farther states, 'That the late Sir Hew Dalrymple, by his assuming and bearing the name and arms of Hamilton of Bargany, upon obtaining the judgment of the House of Peers in his favour, and afterwards laying down and ceasing to bear and wear the said name and arms, and by not bearing and wearing the said name and arms during his whole life, and making up titles to the said entailed estate of Bargany, in terms of the deed of taillie thereof, has contravened the entail, incurred an irritancy of, and admitted, lost, and forfeited the right, title, and interest to the whole lands and estate, and others mentioned in the said entail, both for himself and the other defenders, the descendants of his body, as if they were naturally dead.' And the very same conclusion is stated as to the deed of repudiation; and therefore that it should be found that he had forfeited for himself and his descendants. All I say is, that after every thing which legal ability and ingenuity could urge in support of the matters set forth in this summons, the House of Lords pronounced a judgment, but to the terms of which I do not think sufficient attention has been paid;—because, whatever judgments were pronounced by this Court, either as to the title to exclude, or by mixing up the merits of the question of reduction and declarator with the title to exclude, and then deciding in favour of the defender—the decree of the House of Lords reverses

the whole of these judgments;—for the judgment of the House of Lords, in 1801, is in these words:—‘ That the said interlocutors complained of in the said appeals be, and the same are hereby reversed; and it is declared and found, that the matters in the appellant’s summonses complained of are not sufficient to sustain the conclusions in those summonses, or any of the said conclusions; and therefore assoilzie the defenders.’ Here, on the one hand, we have proof that every thing that this Court had found in this cause was reversed; and, on the other, all that is alleged in the summons as to contravention, and any thing warranting forfeiture, is entirely swept away. The House of Lords pronounced a positive judgment, that the defender should be assoilzied.

This is a point from which we must set out, as irreversibly fixing that contravention never can enter into the consideration of this case. This is an opinion from which, as a Judge, no power on earth shall ever lead me to depart. It is the solemn adjudication by the Court of the last resort, which, on a summons which did bring forward every one thing as to the conduct of Sir Hew Dalrymple which could be twisted into a forfeiture, fixed that there was no foundation for that conclusion. This incontrovertible proposition must be kept in view in every step of the present inquiry, whether the pursuer is, notwithstanding, entitled to prevail in this action.

In considering this case, and in giving my opinion upon it, I feel it absolutely necessary to take an accurate view of the facts of the case, out of which the questions of law arise, however irksome it may be to myself and others. I must take notice of all and each of the deeds, in order to shew that some of them are competent elements for the decision of this case, and others of them not fit subjects to rest any thing on whatever.

The first and most material of these deeds is the entail of Bargany, the destination of which to the eldest heir-female of the body of John Lord Bargany is well known to your Lordships: and I agree with Lord Pitmilley in thinking, and had marked it as an important circumstance in this case, that in this entail of Bargany there is nothing like an indication of the will of the entailer that the person taking the benefit of it should not take any other estate. I do not mean to trouble your Lordships with reading unnecessarily the clauses of that entail; but I must call your attention to what is the leading and primary condition, the first restriction on the heirs of entail; because you will find that that clause, so much dwelt on, contains exactly the,

June 20. 1825.

June 20. 1825.

same provision as for every other act of contravention in the entail. What I mean is on page 16. of the Appendix:— That
 ‘ the haill heirs of taillie above-mentioned, as well male as female, and the descendants of their bodies, who shall happen to
 ‘ succeed to the said lands, baronies, and others foresaid, according to the foresaid destination, or by virtue of the said writ
 ‘ apart sua to be granted by the said John Lord Barganie, shall
 ‘ be obliged to assume, use, and bear the surname, arms, and
 ‘ designation of Hamilton of Barganie, as their proper arms,
 ‘ surname, and designation, in all time thereafter; and if any of
 ‘ the said heirs of taillie, male or female, or the descendants of
 ‘ their bodies, who shall happen at any time hereafter to succeed
 ‘ to the said lands and others foresaid, shall do in the contrair
 ‘ hereof, then, and in that case, the said heirs of taillie, male
 ‘ or female, and the descendants of his or her bodies, sua contravening, shall ipso facto amit, lose, and tyne their right,
 ‘ title, and succession above specified to the said lands and others
 ‘ above mentioned; and the samen, in the case foresaid, shall ipso
 ‘ facto fall, accresce, and pertain to the next heir of taillie who
 ‘ would succeed, if the contravener, and the descendants of his
 ‘ or her body, were naturally dead.’

Now, it is impossible, in the first place, to read this clause without seeing that the will of the entailer is, that the not bearing the name, arms, and designation of Hamilton of Bargany is to be held a substantive act of contravention, inferring the forfeiture of the contravener and his descendants. It is, no doubt, a potestative condition, as Lord Stair calls it, in the heir's power, but it is the leading provision in the entail, that without complying with it, the heir shall be guilty of contravention. The entail then provides, that certain proceedings shall take place, to give effect to the will of the entailer, and to open up the succession to the next heir; and this is done by these words,
 ‘ That it shall be leisome to the next heir of taillie to establish
 ‘ the right thereof in his or her person, either by adjudication,
 ‘ declarator, or serving heir to the person who died last vest and
 ‘ seized therein, preceding the contravener, (and that without
 ‘ being liable to the contravener his or her debts), or by any
 ‘ other manner of way consisting with the laws of this kingdom.’
 And which provision is applied in the succeeding parts of the entail to every one of the other matters that are declared acts of contravention, viz. the altering the order of succession, the contracting debts, and others. Upon that part of the case, it is impossible to doubt that you have here a declaration of the will of

June 20. 1825.

the entail, as an express condition of the acceptance of the inheritance, and that an heir neglecting it shall be held to have contravened the entail, whereupon recourse was to be had to a process, which is not peculiar to this act of contravention as to bearing the name and arms, but is appointed for every other act of contravention whatever.

Now, to assimilate this to an ordinary devolving clause, to which effect may be given by an ordinary action, is in my opinion just to state what is completely opposite to this entail: It is not a devolving clause, and an ordinary declarator is not the proper mode of getting redress. The only mode is by proceeding against the party contravening according to the rules of law, to declare the contravention, and to have it found that the estate has devolved to the next heir. The case of Earlsball has been appealed to, as if it were at all available. I have looked narrowly into that case, and there is just a common clause of devolution, that in the event of the heir making up a title, and attempting to possess the estate of Fordel, the very fact should entitle the next heir to bring an ordinary action; and accordingly an ordinary action was brought, and effect was given to it: that case of Earlsball, therefore, has no earthly connexion with the merits of this question, where the clause relates to an act of contravention. I have been anxious to explain myself fully on this point, because it is the very thing which pervades the whole argument of the pursuer, that though John Hamilton did not do what was pointed out by the entail, effect can be given to an alleged violation of his will without following out the mode of proceeding pointed out by the entail. I most entirely agree with Lord Pitmilley, that this clause in the Bargany entail is just the ordinary clause in case of contravention in every entail. I have looked into the Juridical Styles, and I find that a declarator of contravention is necessary before the next heir of entail can possibly take any benefit by it. Thus, in the form which is given of an ordinary disposition and deed of entail, with prohibitory, irritant, and resolute clauses, it is declared, (vol. ii. p. 206.) ‘ That if ‘ the heirs-male of my body, or any of the said heirs of taillie, or ‘ substitutes above-written, shall contravene any of the conditions or limitations herein contained, &c. the person contravening, &c. shall, for him or herself only, forfeit, amit, and lose all ‘ right, title, and interest to the foressaid lands and estate above ‘ disposed, in the same manner as if the contravener were naturally dead; and the right thereof shall devolve upon the next ‘ heir of taillie, though descended of the contravener’s body, to

June 30. 1825.

‘whom it shall be lawful, whether major or minor at the time, to pursue declarators of irritancy, and to make up titles to the said lands and estate, by serving heir to the person last told therein before the contravenor, or to the contravenor him or herself, without being anywise liable for such contravenor’s debts and deeds, or to make up titles by declarator or adjudication, or any other way by law competent.’

Here you see, that in a common clause of this kind you must proceed by a declarator of irritancy, and that declarator must precede making up the title.

The entail of North-Berwick provided, no doubt, that the estate should not be held by one and the same person except in one event; but that event is most important, namely, that if there should be but one heir-male of the marriage, he should, without incurring an irritancy, enjoy the estate of Bargany. It is material, however, that you should observe, that in regard to this very matter, as to the effect of the clause in the Bargany entail, you have the authority of the Lord President Dalrymple that the view which I have taken of it is the correct one. For in the entail of North-Berwick there is one devolving clause, but there are a great many other clauses as to acts of contravention, in which he repeats the very same provisions as are contained in the entail of Bargany, I mean the clause on page 69. of the Appendix:—‘Therefore it is hereby expressly provided and declared, and shall be so provided and declared, by the resignation and infeftments to follow hereupon, that in case there shall be more sons than one of this present marriage, and that the succession of the said estate of Bargany shall fall and devolve on the heir-male thereof, then and in that case the said heir accepting of the succession of the said estate of Bargany, and the descendants of his body, shall ipso facto amit and lose all right and interest they have, or can pretend, to the lands, barony, and estate of North-Berwick and others above disposed, and the succession thereof shall immediately devolve to the next son of this present marriage, who shall have access to serve himself heir to his predecessor who died last vest and seized therein, as if the heir so accepting of the succession of the said estate of Bargany, and the heirs of his body, had never existed.’

There you see a distinct devolving clause, requiring nothing to carry it into effect but an ordinary action and service. But then there comes the important provision which immediately follows:—‘Or if the foresaid taillied estate of Bargany should

June 20. 1825.

'happen to devolve to any heirs descending of this present marriage after their succession to the foresaid lands, barony, and estate of North-Berwick, and that the said heirs should accept of the succession of the said taillied estate, then and in that case the said heir or heirs their right to the said lands and estate above disposed shall ipso facto cease and become void, except in the case of only one son descending of this present marriage in manner after specified, and the right of succession thereof shall immediately devolve upon, appertain, and belong to the next heir not descending of the body of the contravener, by accepting of the succession to the said estate of Bargany, sicklike and in the same manner as if the person so contravening, and the heirs of his body, had never existed; and it shall be leisom and lawful to the said next heir to establish the right thereof in his person, either by adjudication, declarator, or serving heir to the person who died last vest and seized therein preceding the contravener, or any other manner of way competent by the laws of this kingdom for the time.'

As to this act of contravention, therefore, and every other contained in this entail, the precise same method of ousting the contravener, and declaring the forfeiture of him and his descendants, is provided in the entail of North-Berwick by the Lord President, as in the Bargany entail in regard to not assuming the name and arms.

Your Lordships are aware, that in the entail of North-Berwick there is a reserved power to vary certain parts of it, but so as not to be prejudicial to the heirs of the marriage, namely, 'to discharge or qualify' any of the prohibitory and irritant clauses, meaning thereby to lessen them, not to enlarge and extend them. Now attend to what was done by the Lord President. I need say nothing as to the deed in 1734 authorizing, in contemplation of his right of succession to Bargany, his grandson Sir Hew Dalrymple to serve heir to his father as fiar of North-Berwick, without inserting in his service the clauses relative to the estate of Bargany.

Upon the death of Lord Bargany, the Lord President executed the deed of 8th April 1736, which your Lordships recollect authorized, or rather directed, Sir Hew to accept the succession of Bargany, and obtain himself retoured heir of taillie, and possess the estate so long as he should be allowed, and no longer; and also reserving power to the Lord President 'to alter and innovate what had thereby been allowed, and to renew and redintegrate the said provision that was contained

June 20. 1825. 'in the said contract of marriage, disabling the heirs of North-Berwick to enjoy both estates.' But this reserved power we have seen was not to be prejudicial to the heirs of the marriage.

On the succeeding day, 9th April 1786, the Lord President executed the next deed, on which great stress has been laid by the pursuer, and which has been stated in another quarter as requiring attention. By this deed the Lord President allowed Sir Hew Dalrymple to continue in possession of Bargany during the granter's life, and no longer, and ordained him to divest and denude himself of the estate of Bargany, within six months after the President's death, in favour of John Dalrymple, his second brother, and the other heirs of tailie, and declaring that, on failure, he should incur an irritancy of his right to North-Berwick.

Now, I must observe on this deed, in the first place, That we have no evidence of its delivery, and there is no clause in it dispensing with the non-delivery of it. But I say farther, that it is liable to this observation, that holding it as a deed executed in regard to the granter's reserved powers under the North-Berwick entail, it purposely omitted that important clause in the North-Berwick entail, in regard to only one heir-male existing of the marriage, and his right to hold both estates. In so far, therefore, as it ordained Sir Hew to divest himself absolutely of the estate of Bargany in favour of the heirs of tailie, on failure of his brothers and their issue, it was obviously ultra vires of the Lord President. It was an exercise of power which vitiated the deed altogether. But it is important to observe, and I have gone through the whole of the deeds, that the only place where any notice is taken of this deed is in the factory to Craig; but that factory was granted the very same day, and I agree with the pursuer, that it bears evidence in itself of having been prepared under the eye of the President, and I consider it in fact as his instrument, carrying through his arrangement for effectually separating the succession of the two estates as far as he had power. But he had no power to execute such a deed, because the exception in favour of the single heir-male of the marriage was an inherent and unalterable provision in the marriage-contract; and, therefore, it is not surprising that there should never be discovered the slightest reference to that deed in any of the after deeds or proceedings.

Now it does appear, and I wish to pass over nothing, as the pursuer founds on the whole facts of the case, that two factories to Craig and Kennedy were granted by Sir Hew Dalrymple

under the signature of 'Hamilton,' giving power to them to uplift the rents of Bargany. But when you look at the dates, these factors seem to have had but a sinecure office; for your Lordships will recollect, that the judgment in this Court, in the contest for the estate of Bargany, was in favour of Sir Alexander Hope; and it was not until 1739 that the judgment of the House of Lords was pronounced, altering that judgment, and finding that the estate descended to Sir Hew Dalrymple; so that, whatever may be the effect of the paper on which these factories were written, you have pretty good evidence that they could not operate much in the way of levying the rents. June 20. 1825.

We come now to the deed of repudiation by Sir Hew Dalrymple in 1740, which I will not read at length, as it has been so often quoted. But you will particularly observe, that it takes no notice of these deeds by the Lord President, and I think purposely omits any mention of them; for I shall shew your Lordships immediately that this was intentional. The Lord President had by these deeds appointed his grandson to make up titles to the estate, to enjoy the rents of Bargany during the President's life, and afterwards to denude in favour of his younger brother: but in the deed of repudiation there is no notice taken of all this; he declares that his brother shall have right to the rents since the death of the said James Lord Bargany, and in time coming; and he never made up a title nor denuded himself as required. It is thus clear that the deeds by the Lord President were entirely disregarded, and therefore they are not legitimate elements for our consideration in this case: they were not recorded in any register, and were not delivered, but were departed from, and never founded on by any human being.

But there is another circumstance which I must notice. In this deed of repudiation there is a word used which I think somewhat material; it is in reference to what would be the consequence of taking the estate of Bargany. The words are, that 'in case I shall *now* take the succession of the estate of Bargany.' This little particle '*now*' appears to me to be important, in reference to the nature of these proceedings. Sir Hew Dalrymple refers, in the deed of repudiation, to both entails. The entail of North-Berwick did provide, that he could not possess both estates, if there were more than one heir-male of the marriage; but it has also this provision, that in the event of there being only one heir-male of the marriage, he might take the estate of Bargany, and every other single heir-male of the marriage might do so without incurring an irritancy. Now here, in this deed of

June 20. 1825. repudiation, reference is emphatically made to the time when the grantor felt himself under this difficulty of taking the estate; but it is not said, that if he should at any time be enabled to take possession, he abandoned all claim to the estate. On the contrary, such claim has been imbodyed in the clause of reservation, as it has been formerly called, in the deed of repudiation, but is to which expression I now stand corrected, and I am sure all your Lordships must stand corrected, after what has been so ably stated by Lord Glenlee, that it is not a reservation, not a right retained, but an express condition, and part of the repudiation itself, consented to by John Hamilton, as appears on the face of this instrument. For it was well observed, and ought never to be lost sight of, that these words follow, 'with which express provision thir presents are granted by me, and accepted by the said John Dalrymple.'

The acceptance of a deed in these terms, containing a condition and provision of this nature, must fix, if there is any principle of law at all fixed, that the condition and provision must be taken along with the entire deed. It never was heard of, that a corner, or scrap, or line of an instrument was only to be taken, when you see that the person granting the deed declares that it can only be taken under an express condition. I have, indeed, heard it said, that you may take the act of repudiation, throwing aside the fact stated in it, that he had not then taken the estate, but that he reserved his right to take it; and, in short, that you are to take every thing that makes for the pursuer,—that when you come to put a plain and common sense meaning on the deed, you are to shut one eye, and only to view it in so far as it is favourable to the argument of one of the parties. I must, however, enter my protest against any such doctrine. I am not entitled to look on the deed of repudiation without taking it as an entire deed. I must take it tantum et tale as it stands. We never can forget that, while it contains the consent that John Hamilton should take the estate, it is with the qualification imbodyed in the essence of it, and on which alone it is an accepted deed by the donee, of the grantor's right to take again the estate in a certain event.

The deed of repudiation was followed by the decree in 1741; but it is material to keep in view that it is a simple decree of declarator. It contains a recital of the entails of North-Berwick and Bargany; but there is a total absence of any reference to the deeds and proceedings of the Lord President. It does not take three lines out of the deed of repudiation, but recites it ad

longum, with the condition or reservation, and its date, and the date of registration, with this alteration only, that the word 'now' is turned into 'then;' marking emphatically, that there was something due to that particular word from the way it was used. And then, we know, that after going through all the forms, 'the said John Hamilton compearing by Mr Robert Craigie, advocate, who for instructing the points and articles of the foresaid summons for him, produced in presence of the said Lords the whole writs before mentioned libelled on, of the dates, tenors, contents, and registrations before specified; decree was given, as asked, after the form and tenor of the writs before narrated, conform to the conclusions of the libel.'

Now to suppose that we can look on this in any other light than as a decree proceeding on the deed of repudiation as a whole, is what I cannot understand. It might be just as well to take two or three words out of the entail of Bargany, and then John Hamilton might have got the estate in fee-simple. But when the whole repudiation is produced, and recited ad longum, and decree is given conform to the writs produced, it must embrace the whole of these deeds.

After obtaining this decree in absence, as being in strict conformity with the arrangement between him and his brother Sir Hew, John Hamilton was then served heir of tailie and provision to James Lord Bargany, according to the entail 1688; according to the judgment of the House of Lords in 1739; according to the deed of repudiation of 18th August 1740, registered 11th November same year; and according to the decree of declarator in 1741, all expressly referred to in the retour.

This was followed by the charter 1742, on the terms and construction of which the claim of the pursuer is rested, and which will of course require particular attention in considering the questions of law. After obtaining this charter 1742, we know that John Hamilton possessed the estate till June 1780, when he executed the deed of that year in favour of himself and the heirs whatsoever of his body, whom failing, to his brother Sir Hew Dalrymple, and the heirs whatsoever of his body, &c.; and I do consider it of some consequence, that you have in this deed a declaration on the part of John Hamilton, which was in perfect consistency with every part of the proceedings prior to the charter 1742; for it expressly bears to be granted 'for certain causes and considerations me moving, and in order to give effect to the entail executed by John Lord Bargany in his son's contract of marriage, of date the 18th November 1691 years,' (this

June 20. 1825.

June 20. 1835. was the date of recording, but the entail 1688 was clearly meant), 'and to the conditions upon which my own right and title to the lands under-mentioned was founded.' That is the solemn and deliberate declaration of John Hamilton, in strict conformity with the whole transactions.

Such being the facts of the case, the pleas of the pursuer have been various, but I think they may be reduced to three :—

1. That she is now to be held as the heir entitled to take under the entail of Bargany, in consequence of the facts and circumstances which have taken place.

2. That she is expressly called as next heir to John Hamilton and the heirs whatsoever of his body, (Robert and his heirs having failed), by the terms of the destination in the charter 1742.

3. That she is entitled to reduce the deed 1780, under which the defender is now infeft in the estate.

Your Lordships are quite aware, that these pleas are met by pleas of an opposite nature. The defender states, 1st, That he is, by the entail 1688, and the judgment of the House of Lords, the undoubted nearest heir, being the direct lineal male descendant of the body of Joanna Hamilton, who was the eldest heir-female of the body of John Lord Bargany. 2d, That he is directly called, and not excluded, by the destination of the charter 1742. And, 3dly, Supposing that the pursuer were entitled to claim the benefit of that charter, no prescription has ever followed on it; that, if it were necessary, he could set it aside; and, therefore, that as he is now in possession under the deed 1780, he is entitled to maintain his possession under the existing investiture, which the pursuer has no title or interest to reduce, as it merely replaced him in his legal situation.

Keeping in view the terms and true nature of the various deeds and proceedings already referred to, it appears to me to be impossible in point of law to sustain the first plea of the pursuer, that she is now to be held as the nearest heir of taillie to this estate. No person has yet controverted, that, looking to the entail 1688, the defender is the undoubted heir, as he is the nearest descendant of Joanna Hamilton, who was the eldest heir-female of John Lord Bargany. But, unquestionably, if it can be shewn that, by any proceedings, by any legal process that has taken place, the right which thus belonged to him under the entail 1688 has been annihilated, forfeited, or lost, the pursuer is entitled to the benefit of such proceedings. But I conceive that the onus probandi lies on the pursuer, to show the particular step.

of judicial process, or the combined effect of circumstances, having this consequence. June 20. 1824.

In considering this question, it is certainly necessary to look at the entail of Bargany; and I have already pointed out what I think is the fair import of that important provision as to the necessity of bearing the name and arms. If I am right in the view I have taken, that the omission to do what is there declared is a substantive act of contravention, and that any person incurring it would be liable to be forfeited, am I not entitled to ask, in what part of the proceedings since 1739 have such consequences taken place? Where is there any judicial act affecting the rights of the defender? We are acquainted with the rules of law as to contraventions, that no heir can acquire an entailed succession, on the ground of a prior heir having incurred a forfeiture for himself and his descendants, without producing evidence that his right has been so forfeited by a declarator of irritancy. This is laid down as a first axiom by Lord Stair, by Mr Erskine, and must be the opinion of every lawyer. There is no such thing in law as ousting the contravening heir by implication. If there is no such decision in a court of law declaring a contravention; if there is no principle of law to allow it by implication; and if the mere fact of there being a contravention cannot enter into your minds, unless the contravention has been declared by a decree, I do conceive a most important point is now fixed in this cause.

But the case here is totally different from any such forfeiture being declared. We know, that there was not only no step of that kind followed with success, but that the attempt has been made and has failed; and it has been finally determined, that no contravention or forfeiture can be declared. Supposing, therefore, there was a complete violation of the entail; that old Sir Hew Dalrymple, though merely the heir-apparent, who had not made up titles, yet, in strict construction of the Bargany entail, was bound by all the conditions therein imposed, and that, by not assuming the name and arms, and by granting the deed of repudiation, he had committed a contravention; what can all this avail the pursuer under the circumstances of the case? All these things she put in issue in the former action, and she followed it up with all the industry, and all the ability of her legal advisers, and we have seen the result; and therefore this being a fixed point in the case, that no contravention or forfeiture has taken place, it is of itself almost decisive of the present question. For I would ask, if it ever was known that an heir of

June 20. 1825. entail, or a descendant of one whose right has not been forfeited, or an effectual title secured against him by prescription, was deprived of his inheritance?

But I am aware that it has been said, that there are certain acts and deeds, the effect of which, when taken in a combined view, are sufficient to make up for this deficiency of a decree of declarator of contravention. This position is founded on the deed of repudiation, on the decree of declarator, and on the retour of the service of John Hamilton. I do not mean again to enlarge on the deed of repudiation. If it is good for any thing, it must be taken as a whole. If it is taken as a whole, and the consequences follow from it which the pursuer maintains, let these consequences follow. But I am not warranted in taking one part of the deed, as to the abandonment of the estate, without taking into view also what the provision is on the face of it which qualifies it. If this deed is so taken, I profess my utter inability to comprehend how it can have any such effect as has been given to it by the pursuer. That it was a waiver by Sir Hew of his right for the time no person can doubt, or that it was a deed repudiating for himself and his own right alone, but not for what he could not legally do, or consent to, for his descendants and their rights. For, must I not take along with the deed the very essence of it, that it should be without prejudice to him, the granter, taking the estate upon failure of John and Robert and their descendants, or in case any event should occur, in which he could take it consistent with the entail of North-Berwick; and most certainly the same stipulation is made in favour of his descendants? But it did not require him to make any reservation in favour of his descendants; they stand on the foundation in law of their own right, without any reference to the maker of this deed. Seeing also that this deed was so cautiously worded as to make no reference to the deeds of the Lord President, we have complete evidence to show, that they were as utterly disregarded by the maker of this deed as by John Hamilton the donee. For if these deeds had been any bar to the transaction, it could never have been carried through.

If such is the proper view of the deed of repudiation, is there any thing in the decree of declarator, as contended for by the pursuer, to exclude the right of the defender? The decree 1741 is a qualified decree, and proceeds on grounds and warrants which are fully recited in it. It gives decree only conform to these grounds and warrants; and to give it any other effect, or to hold it as approaching in the most distant degree to a decree of

June 20, 1825.

declarator of forfeiture, has no earthly foundation in law. We must take it as it is. It allows John Hamilton, no doubt, to be served heir of tailie and provision, but you have on the face of it the provision under which he was to be served. This decree appears to me to be nothing more than a mode of carrying into effect the concerted arrangement between the two brothers. They were aware of their situations and of the two entails, and in order to facilitate the making up a title by John Hamilton, the deed of repudiation was granted, and then the decree was pronounced conform to that deed. It will be observed, that it was in absence too, which of itself would have been a ground of challenge within the forty years. I am very decidedly of opinion, that if Sir Hew had thought proper to appear, nothing could have prevented him, if an attempt had been made by John Hamilton to extend the decree beyond the deed he had granted, and on which alone the decree proceeded, to have effectually resisted its being obtained: and you have real evidence that he would have appeared, and put an end to any such attempt. I agree also with Lord Pitmilley, that if, at the distance of years afterwards, Sir Hew had brought a challenge of the decree, by shewing that he was then entitled to take the estate, or chose to run the risk, let the consequences be what they might, (it might perhaps have allowed John Hamilton to deprive him of the estate of North-Berwick, but I am speaking now of the possibility only), this Court would have been entitled to set the decree aside. If it did not appear on the face of it as forfeiting Sir Hew, I ask, how could you imply it? or are you to resort to conjecture as to what effect might be drawn from it? This would be to subvert the fundamental principles of law. No implication can be derived from the face of the decree unfavourable to the defender, and no implication can in any case be resorted to when the meaning is plain.

But there is, lastly, the retour of the service of John Hamilton, the terms of which have been already noticed. It is most important to recollect, that that service proceeds according to the tenor of the deed of repudiation, which is expressly referred to in it by its date, and the date of its registration, and according to the tenor of the decree also referred to in it; and as this is the retour of a general service, which does not require the insertion of the whole contents of the deed of entail, of the deed of repudiation, or of the decree; and as there is a general reference to them on the face of the retour, every thing that is in these instruments is fair and legitimate subject of consideration. The

June 20. 1825. retour is according to the entail 1688, and you must look at that entail; it is according to the deed of repudiation, and you must look at that deed; and according to the decree, and you must look at it. This service is, therefore, one *tui generis*. It sets forth the fact, that the estate had descended to the elder brother, and that John Hamilton is the second brother, and that Sir Hew had repudiated the succession, and consented that the said John Hamilton, in respect of his said repudiation, should serve himself heir of tailie and provision to the said James Lord Bargany, and make up titles in his person to the said estate of Bargany, in the mode competent by law. This reference to the deed of repudiation naturally lets you into the consideration of the whole of that deed. You must take it as a whole; and, on the face of it, it was a qualified service, and one of a peculiar nature, to which all the doctrine drawn from the Act 1617, establishing the vicennial prescription of retour, is entirely apart. That prescription may have its effect in certain circumstances; but it is personal to the individual served: and in this case it is impossible to look at the retour, without seeing that John Hamilton was not the nearest heir in life; that it was merely for a temporary purpose, and that it does not even raise the question of prescription, as to which I concur in thinking that a satisfactory answer is contained in the opinions of our brethren who have been consulted. Without any reduction of the service, I am clear that any party, founding on this deed of repudiation, would have been entitled to say, 'I pay no regard to that service; it is enough for me to shew, that I have right to the estate by the very terms of the instrument by which you were served.' There can be no doubt that the benefit of this service was personal to John Hamilton; and, in any question that might have arisen between him and another party, he might have said, 'I take no benefit by that service.' On looking into the second case of Edinglassie, I have seen nothing interfering with the first decision of it; and there is another circumstance to be noticed as to that case, that the losing party enters a protest against the judgment for remeid of law in Parliament, which was the form of appealing at that time. This appears from the report of the case by Lord Fountainhall, and we see nothing farther of it.

I have never yet been able to comprehend how the service of John Hamilton by itself can be of any importance in this case, as nothing in the previous proceedings had occurred to deprive the defender of his undoubted right as heir of tailie under the

June 20. 1825.

entail 1688. Could this service prevent an heir from entering into possession of the entailed estate? I apprehend not. It would be establishing a new doctrine in the law of succession, for which I have never seen any authority in our institutional writers, or in your Lordships' decisions. Therefore, neither by itself, nor combined with the deed of repudiation and the decree, can I find any thing in this retour in the least degree aiding that proposition, that under all the facts of this case Mrs Fullarton is the heir entitled to take under the entail 1688.

As to the difficulty with regard to the succession reverting, I have little to add to what has been stated by some of your Lordships. In the first place, as to the legal impossibility or incongruity in the succession reverting, I have no conception that there is any foundation for it. The cases of Lord Mountstewart and McKinnon establish the direct contrary, that there is nothing so incongruous in the circumstance of a right of succession reverting. But I have another authority which is deserving of attention, because it is to be found in the deed of that very person whose will and intention are so much relied on; I mean in the entail of North-Berwick. If the reverting back of the succession is so incongruous, it would be surprising that the Lord President, the Head of the College of Justice, should execute an entail, not only contemplating such an event, but making an express provision for it. It is, however, expressly declared in the North-Berwick entail, 'That albeit the next heir of taillie existing may, upon the said contravention, obtain established in his person the right of the saids lands and estates, by declarators, adjudications, service, and retour, or any other way competent by law, yet, notwithstanding thereof, in case a nearer heir of taillie should happen to exist, after obtaining of the foresaid declarator, or adjudication, or service and retour, by virtue of the contravention, as by procreation of a child or children of the contravener's body; in that case the person so succeeding upon the contravention shall not only be holden immediately thereafter to denude in favour of the said nearer heir, and other heirs of taillie above-written, under the conditions and irritancies foresaid, that the course of succession be no farther diverted than to exclude the contravener himself; but also the right of the person so succeeding upon the contravention, and their heirs of taillie foresaid, shall ipso facto become extinct, void and null, so soon as the nearer heir exists.' Here you see that this, which is held an incongruity in the law, is looked on not only as innocent, but is actually provided for. I

June 20. 1825. know that this is only the will of that person, but it shews that there was not supposed to be any incongruity in the circumstance.

But this being the will of the entailer of North-Berwick, I agree with Lord Pitmilly, that, in this question, it is a more legitimate source of inquiry to see what was the will of the entailer of Bargany. Now, is it to be found in the entail of Bargany, that, in the case of an heir being absent, or abroad for a length of time, and a remoter heir having served, if the nearer heir had afterwards returned, that he was to be excluded? Suppose that Sir Hew Dalrymple had been a long while abroad, and evidence had been brought forward at the service of John Hamilton to shew that, from all that could be learned, there were good grounds for holding that he was dead, (and I myself was introduced to a Mr Hunter lately, on my circuit at Glasgow, who had been for above twenty years among the North American Indians), and that John Hamilton had been served, I say that though he had possessed for thirty-nine years on his service, if Sir Hew had made his appearance, or a descendant of his body clearly making out his propinquity, he might have put an end to all these proceedings—he might have disregarded this service altogether.

But while you have clear evidence that Sir Hew Dalrymple never was forfeited of his right, you have the declared will of the entailer, that he was entitled as nearest in blood to succeed to the estate.

This leads to the second proposition, however, as to the effect of the charter 1742. Your Lordships are aware that the pursuer founds on these words, as directly calling her, and excluding the defender, ‘*Quibus deficientibus aliis hæredibus quibuscunque ex corpore dict. Domine Joanne Hamilton.*’ The question is, What is the true legal construction of these words? Do they destine this estate only to those heirs who, in the order of nature, or in the order of law, or of this entail, are entitled to succeed posterior to John Hamilton and the heirs of his body? or do they not include all and each of the heirs of the body of Joanna Hamilton, other than John Hamilton and the heirs of his body, whether before or after him?

I had thought it had been admitted, but it is difficult to find out in this case what is admitted, that if these words had been found in an original charter, there would have been no doubt as to their meaning. But whether it is admitted or not, I have not the slightest doubt that, according to the plain and obvious, as well as the legal and technical meaning of these words,

June 20. 1823

there is not a ground in law for doubting that they do not only not exclude, but that they actually comprehend all and each of the heirs of the body of Joanna Hamilton, other than John Hamilton and the heirs of his body. The meaning of the clause appears as plain, as if it had occurred under the circumstances of John Hamilton being the youngest son, and there being no daughters. Had there been ten elder children preceding him, they must have been all included under this destination. But I don't think the meaning of the clause would have been a bit clearer in that case, than in the actual circumstances. For, I must ask this question, what is there on the face of the destination to warrant me in saying, that some of the heirs are not included? Are the words not so broad as to include both? It is indeed said, that the term heirs is flexible. It may be so. But then it is only with regard to the heirs of a particular individual, when the question is, whether it is the heirs of the body, the heirs-male, or the heirs whatsoever of such a person? But there is no room for conjecture here as to what sort of heirs is meant; the words 'other heirs whatsoever of the body of Joanna Hamilton,' remove all ambiguity; and when you see the words 'other heirs of the body,' must they not, by the clearest principles of common sense and grammar, include all the others? I profess myself unable even to raise a doubt on this question; and I would be just as well warranted to say, that it was meant to confine it to the daughter that had married into the Reay family, and to leave out the daughter married to Duff of Crombie. I must give fair play to the words; and neither in grammatical, nor in legal and technical construction, do I find the least difficulty in saying, that not only is the defender not excluded, but that he is positively included. There is a maxim to be found in the Roman law, which ought never to be lost sight of. It is in the Pandects, lib. 32. tit. 3. l. 25. 'cum in verbis nulla ambiguitas est non debet admitti voluntatis quæstio.' That is a maxim which must ever predominate in your Lordships' minds; and it is laid down by every writer on the interpretation of deeds, that if words of a plain legal meaning are used, and especially in the dispositive clause of a charter, you cannot deny effect to them, unless there is plain declaration in the instrument itself, that the maker of the deed used them in a different sense. We have had lately cases of that kind before us, the cases of Marchmont and Urrard. In these cases, your Lordships will recollect that it was the opinion of the Court, that the words, being clear legal technical terms, were to have their full effect; and even in that question

June 20. 1825. of Urrard, where it was said that there were other parts of the deed tending to shew the words were used in a different sense, the Court held that there was no such sufficient declaration plain as to controul the legal meaning of the words.

I have heard reference made to another case, namely, that of *Wedderburn v. Colville*, in 1781, where it being found that the estate belonged to the pursuer and the heirs of her body, whom failing, to the other heirs of tailie, according to the order therein specified, it is said that no doubt was entertained, that if the pursuer and the heirs of her body were to fail, the estate would go, not to the heirs who had been formerly excluded, but to the heirs substituted to the pursuer and her heirs. But there is this material circumstance attending that case, that it was one of a declarator of contravention and irritancy, for finding that the party's right should be forfeited for ever; and no doubt when the decree is so taken, it appears on the face of it that the contravener's right was forfeited, and then that the destination was to be thereafter in terms of the entail. But that is not a case on which the question can be raised, because you cannot look at the decree without seeing that the contravening party had lost and forfeited the estate for ever. In the present case, if there had been a declarator and decree of contravention and forfeiture against Sir Hew Dalrymple and his descendants, it would have been imbodyed in the investiture 1742, which would have referred to that decree as much as to the entail and the deed of repudiation; and if it did so, I say it would not be a case where this question of construction could occur. You would only require to read the decree with your eyes open, and you would see Sir Hew's right, and that of his descendants, forfeited and lost for ever; and then that the destination was to go on in the terms of the entail. But there is just that desideratum in the present case, that there was no decree of irritancy.

I must however observe another circumstance, which, whether it be considered material or not, has its effect on my mind, that the construction put by the defender on the terms of the destination in the investiture 1742 is no invention of his, because it is the construction that was put on it in the former proceedings by the legal advisers of the pursuer herself. This very circumstance of the destination being taken in the terms it is, was substantively laid by her in her former summons as an act of contravention, in which not only John Hamilton was concerned, but Sir Hew Dalrymple, for the purpose of making this estate revert to Sir Hew; and, therefore, it is a pretty important circumstance in

June 20. 1825.

the question of construction, that the defender is not inventing the construction he contends for, but that he has the authority of all the legal advisers who assisted the pursuer in the former action, that such is the proper construction, and which I must say every lawyer must put on it when taken per se.

I am quite aware that two views have been taken, as leading to the putting a different construction on the destination in the charter 1742, and these have been very ably urged.

1st, It is maintained, that by reference to other parts of the charter itself, and taking into view the entail 1688, you have a key to the true meaning of the destination; and, 2d, That by referring to the intention of the parties, it is clear that the pursuer's construction is the right one. I have no objection to meet the pursuer on both these views.

Looking to the quæquidem clause of the charter, to which reference is made, (though it may well be questioned whether it is either safe or competent for any Judge to refer to such a clause to controul the clause of destination), your Lordships will recollect that it refers to a variety of deeds and proceedings; but if this clause is to be resorted to at all, I have arrived at this conclusion, that it must be resorted to as a whole. I hold it to be contrary to the rules of law, as well as of eternal and immutable justice, to look at one part of this clause, and not at the whole of it. It is easy to conceive, that if you are to take one member of the clause, and leave out another, a party may just found on what is favourable to him, and leave out all that is unfavourable. By taking part only of the deed of entail, which is also contained in this charter, the estate might be held in fee-simple. So say I as to the quæquidem clause; you must take it as a whole; and when you attend to that, and look at this clause, as containing the grounds and warrants on which the charter proceeded, so far from finding any thing to aid the construction of the pursuer, you will find real evidence against it.

Your Lordships know, that the clause of quæquidem contains the whole progress of the titles and proceedings, by which John Hamilton arrived at the time when he could take the charter 1742. I will not go through the deeds again, as your Lordships will recollect them. It states the deed of entail 1688, the deed of repudiation, according to its date and registration, the decree of the Court of Session by its date, which we know contains ad longum the deed of repudiation, and lastly the retour of John Hamilton's service. It just contains a reference to every one of those judicial acts and proceedings, which led to the fact of John

June 20. 1825. Hamilton having acquired right to the procuratory of resignation in the entail 1688, all distinctly specified, though not fully embodied in the clause of *quæquidem*.

Now, to be told, that though reference is made to these deeds, yet, because they are not recited *ad longum*, we are not to look at them, is about the wildest doctrine I ever heard. The clause refers most distinctly to these different proceedings; and I am no more entitled to put out of view any clause in the deed of repudiation, than I would be to put out of view any clause in the deed of entail. I must take the whole as the grounds and warrants of the charter; and then, with that special reference to the deed of repudiation, I am bound as much to take it with all its parts as any other clause of the deeds. If such be the result of an examination of this clause, and I find no other clause to give me any assistance, and taking into view the entail 1688, which prefers the nearest heir-female of Lord Bargany, I profess I have not been able to find any thing on the face of the charter to create any doubt that the words of the destination have a different meaning from their plain and obvious sense. Therefore it is not by the charter itself, nor by the sasine, that you can interpret the clause of destination differently from what it legally bears. It is said that there is no reference in the sasine to the deed of repudiation; but then there is no reference in the sasine to the entail 1688; and according to this argument the estate must be held in *fee-simple*. The sasine must therefore be held as relative to an original charter; and if the charter 1742 is viewed as such, it seemed admitted that the estate must go to the defender.

But then, in the last place, it is said, that, from the facts and circumstances of the case, there is evidence that the destination was purposely framed to exclude Sir Hew and his descendants. I have no intention of going back on what I have already said on this point; but I will just state in general, that, considering the whole train of the proceedings, the absence of all attempt to forfeit Sir Hew Dalrymple or his descendants by John Hamilton, the perfect understanding that seems to have subsisted between John Hamilton and his brother, shewing that every thing that was done was in reference to Sir Hew's then situation; the terms of the deed of repudiation, not only with the condition contained in *græmio*, but no notice taken of the deeds of their grandfather, while the decree proceeds on the deed of repudiation, and recites it at full length, and the *retour* makes special reference to it;—there seems no reason to doubt, that the destination was purposely framed so as to include Sir Hew and his descendants, and to

facilitate the exercise of the undoubted right he had expressly reserved. June 20. 1825.

It is not necessary, in this question of intention, to suppose that John Hamilton contemplated any actual challenge of his own right or that of his children. But when you consider the terms of the deed of repudiation, in which Robert Dalrymple and his descendants are mentioned, and when you see that the destination 1742 is not taken to Robert and his descendants, I think you have a manifest proof that the predilection was in favour of Sir Hew and not Robert: There is nothing to shew any predilection to Robert or those after him. On the contrary, when the proceedings of John Hamilton are taken in reference to those of Sir Hew, you have proof that his predilection was in favour of his elder brother, to allow him to take the estate in terms of the express provision of the deed of repudiation. If the right of John Hamilton alone had been in view, it would have been enough to take the destination in favour of himself and the heirs of his body: he had no motive to go farther than the heirs of his body; but he had every motive to frame the clause in such a way as to bring in Sir Hew, or at all events his descendants.

But it occurs to me, that the clause of destination itself affords evidence of the true meaning and intention of framing it in the way it has been done. Your Lordships are aware of the words of the charter 1742, '*Quibus deficien. aliis hæredibus quibus-
' canque ex corpore dict. Dominæ Joannæ Hamilton, procreat.
' inter illam et dict. Dominum Robertum Dalrymple;*' then follows, '*quibus deficien. aliis hæredibus femellis ex corpore dict.
' demortui Joannis Domini Barganie;*' and then a long train of names. But if it had been the object of John Hamilton to frame the destination in the way contended for by the pursuer, where was the difficulty in stating that in the destination in express terms? Is there any conveyancer who would have found any difficulty in putting this beyond the possibility of a doubt, by declaring, that by the *hæredibus quibuscunque* were meant those following in the order of law or of nature, or in terms of the entail 1688, after John Hamilton? There would not have been the slightest difficulty in this. But if this could be done, it is a material circumstance in the construction of this clause, that though it makes no express reference to the entail 1688, yet it will be found, on a careful comparison between this destination in the charter 1742, and the original clause in the entail 1688, that, with the exception of that general phrase, '*to the other heirs of
' the body of Joanna Hamilton,*' the writer of it has just inserted

June 20. 1825. one and all of the heirs, and classes of heirs, entitled to take under the entail. Now, I ask your Lordships, when the fact is notorious that at the time John Hamilton had a younger brother, Robert, and two sisters alive, if the intention had been (we are here only speaking of the intention) to bring in only them, and to leave out Sir Hew, and when you see this enumeration of every other individual and class of heirs, and, instead of the destination particularizing Robert and his sisters, this general phrase purposely used, '*aliis hæredibus quibuscunque ex corpore dict. Domine Joannæ Hamilton,*'—does it not amount to a legal demonstration, that the intention was not so to limit it, but directly to include Sir Hew?

If, then, it is the legal construction of the charter 1742 that Sir Hew was not excluded, the only other ground on which the pursuer's plea can rest is, by interpolating an exception which would exclude him; and that, because he had temporarily consented that his brother should take the succession, you are to arrive at the conclusion, that a meaning, totally different from that of the whole charter and the intention of parties, is to be put on the destination 1742. This appears to me the most dangerous doctrine ever stated in any case,—that where there has been no forfeiture, no legal process to establish forfeiture, nothing judicially done to have the effect of a forfeiture, your Lordships are still to imply it. It appears to me to be a monstrous proposition, for which I find no law or authority—no decision in the least degree bordering on it.

But though I am of opinion that such is the legitimate construction of the terms of the charter 1742, I am quite aware that there is this ground maintained by the pursuer, which would entitle her to take the succession,—namely, that taking for granted that we are all wrong, and that she is truly called by and entitled to the benefit of the charter 1742, and to reduce the disposition 1780, that right has been secured, and the right of the defender under the entail 1688 cut off, by prescription. This has been met by the defence, that there has been no prescription, and that the defender is entitled to reduce the charter 1742.

On this last branch of the question I am decidedly of opinion, that if it were granted that the destination in the charter 1742 was in favour of the pursuer, and prejudicial to the defender, he would be entitled to reduce it; because no prescription has run so as to give the pursuer the benefit of that destination; the fact being, that the charter and sasine on it are dated in 1742; and that in 1780, when forty years had not elapsed, a new deed was

executed by John Hamilton, followed by infestment, doing away all the effects of the charter 1742 to the prejudice of the defender. It is impossible to doubt that this is true in point of fact, as we have only to recollect the terms of the disposition 1780, to see whether, after that, there continued any investiture which excluded the defender. John Hamilton had possession under the charter 1742 for only thirty-eight years; and undoubtedly, quoad the interest of the parties in this question, the prescription was interrupted by not leaving the destination in the disposition 1780 doubtful, but directly calling Sir Hew Dalrymple by name. This was the voluntary act of John Hamilton. It was the consistent act of John Hamilton; and there is a declaration in it, that it was in conformity with the conditions on which he held the estate. This was what Sir Hew might have compelled him to do, if, in 1780, he had discovered that John Hamilton had done or intended any thing prejudicial to him; and I hold it clear, that Sir Hew would have been entitled to have had it found and declared, that there was nothing contained in the charter 1742 to operate to his prejudice, and thus prevented the running of a course of prescription. But John Hamilton did voluntarily what he might have been compelled to do. The deed 1780 put a total end to any benefit which can be supposed to have been derived to the pursuer from the charter 1742.

I know it has been said, that, with regard to John Hamilton individually, the disposition of 1780 was not such an alteration of the investiture as would have entitled parties to have ousted him; but you will always recollect, that we are in a question, not with John Hamilton, but with a third party. The pursuer is not entitled to found on the possession under the deed 1780. She cannot take two years from the possession under the deed 1780, to add to the thirty-eight years' possession under the deed 1742; because, by the deed 1780, her right, if she had any under the deed 1742, was completely changed. A new course of prescription took its rise from June 1780; and thirty-eight years, having only run of the possession under the charter 1742, she cannot say that prescription has run on it, even holding the destination in that charter to be in her favour. I am, therefore, quite clear, that the defence of prescription is amply sufficient on the part of the defender.

I will only remark farther, with reference to the terms of the charter 1742, and as to the defender being heir under the entail 1688, that I see no difficulty in his serving heir of tailie and

June 20. 1825.

June 20. 1825. provision to John Hamilton, who was last infeft. There is no incompatibility in his doing so. The investiture 1742 was an investiture for a temporary purpose, and John Hamilton was a mere usurper. But if there were any informality in the defender so serving, he would be entitled to put that investiture out of the way, which, however, appears to me to be unnecessary, as he is already in possession under the deed 1780.

I am, on the whole, clearly of opinion, that the pursuer has no interest, and consequently no title, to reduce the deed 1780, as she is not called by the charter 1742 to the exclusion of the defender; and that, even if it could be shewn that she had an interest as claiming under the charter 1742, her right has not been secured by prescription, nor has that of the defender been cut off by it. The defender is undoubtedly the nearest heir under the entail 1688; and before he can be legally deprived of his estate, it must be proved, either that he has forfeited, or that his ancestor has been declared to have forfeited his right as heir, or that it has been cut off by a prescriptive title acquired by the pursuer. But to neither of these different propositions is it possible for me to accede.

I shall conclude with only one other observation, that it would be the most extraordinary result in the annals of judicial procedure, if, although the defender is unquestionably the nearest heir of taillie under the deed 1688; although he is not excluded, but directly included in the destination of the charter 1742; although this deed, if it could be held conclusively prejudicial to him, has not been fortified by prescription, and could, if necessary, still be removed out of the way; although it is finally fixed, that no contravention or irritancy was declared to have been committed by his predecessor, and none is attempted to be declared against him; although no complaint, in fact, is made that any person, who did not stand before the pursuer in the order of the entail, has for a moment been preferred to her; and although the defender is expressly called to the succession by the deed 1780, and is now in possession of the estate,—yet, notwithstanding all these incontrovertible propositions, to my mind at least, he is still to be ousted by some legal magic, and the estate transferred to a distant substitute,—I do unfeignedly declare, that if such should be the result, I do not know any entailed proprietor in Scotland who would be secure in the tenure by which he holds his estate.

The Court, accordingly, pronounced this interlocutor:—
'Find, that the defender, under the destination of the entail

June 20. 1825.

' executed by John Lord Bargany in 1688, and the judgment
 ' of the House of Lords in 1739, is the nearest heir of taillie
 ' and provision now in existence, entitled to the succession of
 ' the estate of Bargany, as the descendant of the body of the
 ' eldest heir-female of the body of the said John Lord Bar-
 ' gany; and that no contravention, irritancy, or forfeiture
 ' ever was declared against him, his father, or grandfather,
 ' although an action for that purpose was brought, in which the
 ' defender's father and others were called as defenders, and in
 ' which decree of absolvitor was pronounced by the House of
 ' Lords; and find, that this being the case, no act whatever of
 ' Sir Hew Dalrymple, the defender's grandfather, could affect
 ' the interests of any of his descendants, being heirs of taillie:
 ' Find, that nothing following from the deed of repudiation of
 ' Sir Hew Dalrymple, the decreet of declarator, or retour, of
 ' John Hamilton's general service, could in law deprive the
 ' defender of his right of succession under the entail: Find,
 ' that the defender, by the destination of the charter 1742, is,
 ' according both to its legal construction and its true intention,
 ' called to the succession of the estate after John Hamilton, and
 ' the heirs whatsoever of his body; and that if it were now neces-
 ' sary for the purpose of completing a title in his person, it would
 ' be in the power of the defender to obtain himself served heir of
 ' taillie and provision to John Hamilton, as the person last infest
 ' in the estate: Find, that even if the pursuer could constructively
 ' be held entitled to the benefit of the destination in the charter
 ' 1742, her right has not been secured by the positive, nor
 ' that of the defender to set aside the whole proceedings cut
 ' off by the negative prescription; and that the vicennial pre-
 ' scription of retours is not applicable to the case; and there-
 ' fore, that the pursuer can have no title or interest to challenge
 ' the deed executed by John Hamilton in 1780, by which the
 ' defender's grandfather, and the heirs whatsoever of his body,
 ' were directly called to the succession, on the failure of John
 ' Hamilton and the heirs whatsoever of his body; but find, that
 ' for defending himself in this action, it is not necessary that the
 ' defender should institute any process of reduction. They there-
 ' fore sustain the defences now pleaded for the defender against
 ' this action, assoilzie him from the whole conclusions, and
 ' decern.*

* 2. Shaw and Dunlop, 655.

June 20. 1825. Mrs Fullarton appealed.

Appellant. Under the circumstances and facts which have occurred, the appellant is now nearest heir of entail of Bargany.

1. She has a right, in terms of the original *taillie* of 1688, to succeed to the estate of Bargany next after the heirs of the body of John Hamilton, and of his younger brother Robert Dalrymple; and both these brothers have died without issue. No doubt Sir Hew, son of Joanna, had a prior right of succession, or rather carried that right into execution, and did succeed; but for an onerous consideration, (namely, being enabled to keep and enjoy North-Berwick, a more valuable estate), he renounced and relinquished Bargany; and he did so for himself and his descendants. He and his descendants are, in the present question, as if naturally dead; and this answers a great mass of the respondent's pleadings. Sir Hew's place, certainly, was before the appellant's grandmother, Marion. But it was a place enabling him to succeed to James Lord Bargany,—not to succeed to the younger brothers, John or Robert. Looking to the words of the entail 1688, that would be the expression of a palpable absurdity. On the other hand, the appellant's place was to succeed to John and Robert, on failure of their issue; and it is precisely her place that the respondent is attempting to occupy. In entailed succession the question is, whom does the deed of entail point out as heir to the last lawful possessor of the estate? for it is the entail that forms the law which dictates the order of time, and the series of substitutes. But the entail 1688 says, that Sir Hew is the heir to Lord James. It is impossible that he could, under the entail, be heir to John. To say that Sir Hew merely for a time changed places with John, and that the appellant had no reason to complain, seeing she came after both, does not better the matter. In asserting or proposing that change, Sir Hew violated the will, and acted directly contrary to the intention of the entailer, and in manifest opposition to the terms which measured Sir Hew's own right. The holding both estates being, from the fetters in the two entails, incompatible, he had his choice which to retain for himself and his descendants. He chose North-Berwick, and that such choice should be (as intended by the entailer) perpetual, and not temporary, was of value to the appellant. View the case as you may, the result of the judgment of the Court below is enabling an heir, called under a condition, to defeat that condition, to frustrate the view of the entailer, and, without right or title, to wrest from the

June 20. 1825.

party entitled to be benefited a valuable inheritance. There is no disguise which can screen the fact, that Sir Hew, if he obeyed the injunctions of the entail of North-Berwick, could not obey the injunction of the entail of Bargany; and if he did not and could not obey the injunctions of the latter, he must forfeit the estate. But if he had forfeited, then he and his descendants were erased from the Bargany entail. No argument could give them in that case the colour of a claim to emerge again, and step in before a substitute heir; neither can it where Sir Hew, instead of being forfeited, has deliberately renounced for himself and descendants.

2. The estate of Bargany was not, through inattention or other cause, left unclaimed by the substitute heirs, on Sir Hew's holding by an entail incompatible by the conditions under which the heirs of the Bargany estate were obliged to possess. His brothers did not decline interfering until, by working off the incompatible conditions, he might have found himself in a condition to hold both estates. On the contrary, John not only accepted a renunciation, formally and deliberately made by Sir Hew, but took the most decisive legal steps to invest himself with a title to the estate; and it is undeniable that he possessed it for half a century. There is no doubt that Sir Hew was entitled to make his option; and if one estate was materially more valuable than the other, it is easy to be predicated on which his option would rest. It is equally clear he was entitled to renounce. An entail is a donation; and a person may refuse a gift; or, having accepted it, may transfer it. He had a *jus crediti* to the estate of Bargany; but he could waive or assign it. An estate does not descend upon the disponent like an hereditary grant, which *inhæret ossibus*. Sir Hew agreed, for an onerous consideration with the President, to go out of the Bargany entail; and this agreement was quite lawful. He renounced that estate, and let in John, the next substitute; and John took advantage, in a competent shape, of this event. He, in a legal form, connected himself with the estate, and died vest and seized in it. Then what says the entail?—that the appellant comes in, failing him and his younger brother without issue: and they have so failed. Sir Hew, or his descendants, cannot come in; they cannot be resuscitated. The respondent has endeavoured to meet this view by maintaining, that it is recurring to the exploded ground of contravention on the part of Sir Hew. But this is a mistake. In the appellant's early action, she thought that by the facts stated in her summons a contravention had been committed. The judgment of the House of Lords corrected that error.

June 20. 1825. She no longer stands on that plea, but that she is the next heir to John,—that John lawfully acquired the property,—and she cares not how Sir Hew has happened to fall out. But even if she did state acts of contravention, provided they were stronger and more relevant than those in her former summons, there would be no bar to the conclusion that must necessarily follow. Of as little weight is the objection, that John in his declarator not having inserted a conclusion that Sir Hew had contravened the entail,—that his right was irritated,—and that he had forfeited the estate, room has not been made for the appellant in a competition with Sir Hew's descendants. Such a precaution was not necessary. The value attached by the Court below to a 'declarator of contravention,' rests on a misapprehension of the statute of entails. It was enough that the summons declared John's right to succeed to the estate. That ousted Sir Hew. Besides, a declarator was the very mode pointed out by the entail 1688. But even if any doubt rested on that point, John (obeying the entail) served himself heir to the person who died last vest and seized in the lands, and thus fixed himself in the succession as rightful heir of tailie and provision; and the retour having been unchallenged for twenty years, cannot now be redressed. To contend that the decree of declarator and service were conditional and temporary titles, is founded on an assumption of a power which Sir Hew did not possess. He could not, by any bargain with John, traffic for that right to the Bargany estate. He might no doubt have kept it, and thus lost the North-Berwick estates. But he could not say to John, 'I, for myself and my descendants, shall relinquish the estate for twenty or fifty years, or until your death, or the death of your children.' The terms of the entail were made by the entailer, and could not be altered by any of the substitutes. If John had accepted, by such a bargain he would have incurred a forfeiture. Accordingly the retour is quite silent as to the reservation, and indeed every one of the steps taken to complete the investiture is inconsistent with the supposition of the renunciation being temporary. They rested on the assumption, that the exclusion of Sir Hew and his descendants was absolute and total. That was the President's intention; and to make it so was an obligation incumbent on Sir Hew, agreeable to his arrangement with the President. But whether or not, at least the appellant has no concern with the reservation. She is entitled to take after the last person vest and seized; and the repudiation containing the reservation forms no part of the titles to Bargany.

June 20, 1825.

3. But, independent of this view, the appellant is under the charter of 1742 next heir of entail to Bargany; John and Robert having failed, without heirs of their bodies. This point depends on the construction to be given to the clause, 'to the other heirs whatsoever of Joanna Hamilton.' The respondent maintains, that he has a new title, viz. the charter of 1742, rendered by prescription unchallengeable; and that by that charter he, as included in the list of other heirs whatsoever of Joanna Hamilton, comes in before the appellant. But if so, the deed of 1780, sought to be reduced, does no harm to her, as it merely calls those who independently of it are called before her. In one sense, the respondent is right. He is heir whatsoever to Joanna Hamilton, in preference to the appellant; but he is not heir whatsoever of the body of Joanna, under the charter 1742. This charter was certainly meant to carry into effect the entail of 1688. Its contents prove it. A party must be held to have intended to do that which he had power to do; and John had no power to change the series of heirs, or alter their place. Nothing could speak out this stronger than the recital in the assignation by Sir Hew to the assignee. Indeed, every deed to which reference has been made, shews that, by the term 'other heirs,' John Hamilton must have meant heirs of entail posterior to himself. Nor could the charter have been drawn otherwise. A superior has no power, in granting a charter, to alter the terms of the procuratory, which is its warrant. No doubt there may be a variation to a certain extent,—as in suiting the charter to existing circumstances, as taking 'in favorem' of the heir in existence, without narrating the previous failures; but as to the succeeding order or arrangement, the procuratory is the warrant that must be obeyed. To avoid this conclusion, the respondent represents the charter 1742, and sasine, as forming a special and original title in his favour, independent altogether of the entail 1688; and by virtue of being an original investiture, calls, under the words 'other heirs whatsoever,' &c. Sir Hew's descendants in preference to the appellant. But the charter cannot be considered as 'per se,' or as a solitary instrument. It is merely one of the titles under the entail of Bargany; the first feudalization of the original procuratory of resignation containing the taillie. It was not a deed executed by John in virtue of powers inherent in himself, but was executed under the will and authority of the entailer, who had predestined the series he chose to favour. Consequently, the terms 'other heir whatsoever,' signify the heir of provision of the standing destination; that is, the heir next entitled to take the succession by the relative

Jan. 20. 1825. taillie of 1688. But even if the charter were to be considered 'per se,' still the appellant is entitled to succeed in preference to Sir Hew. That charter demonstrates, that Sir Hew and his descendants were removed out of the entail of Bargany, and passed by as if dead; consequently, under that charter, the appellant, after John Hamilton, is the next heir whatsoever of taillie and provision of Joanna Hamilton. Indeed, using the expression 'other heir whatsoever,' settles the point. For John could only be considered an heir whatsoever, on the supposition that his eldest brother's descendants were as naturally dead. It is mere fallacy to regard the title 1742 to give the appellant a new right which she had not under the entail 1688. The right she enjoyed was the right of taking immediately after John, (on failure of his and Robert's descendants). But John has taken, and has died without issue; so has Robert; and nothing has been done under the subsequent titles to cut her out and substitute Sir Hew, the person who, if he could, in relation to the entail, have been regarded as in existence, must have excluded John. It is idle, therefore, for Sir Hew to repeat, that he is heir of the taillie 1688. Be it so; but is he heir to John Hamilton under that taillie? To hold that he is, would be a violation of every rule of legal construction. But, even were the steps taken by John Hamilton to vest in himself the right to the Bargany estate challengeable, the titles he did make up, and the possession he enjoyed, are made available to the appellant by the prescription of twenty years applicable to retours, and by the prescription, negative and positive, of forty years. Thus the character of lawful possessor of the estate of Bargany has been fixed on John, and the appellant is next in succession to him. This prescription was not interrupted by the deed of repudiation containing the reservation; for no right of reversion can be effectual if not expressly mentioned in the investitures which enter the public records. Besides, the respondent has lost the benefit of this provision by the operation of the negative prescription. Neither did the deed 1780 interrupt. That deed was a fraud upon the substitute heirs, and against the entail 1688. Besides, John Hamilton neither did nor could ascribe his possession to it. He ascribed his possession to the investiture 1742,—and, consistently with common sense, he could not do otherwise. But the conclusive answer is, that, by the deed 1780, John reasserted the validity of his actings in putting his brother aside, and taking himself the estate. It was the very reverse of a desertion of the right to exclude the elder brother. And how can Sir Hew avail himself of that deed? There,

June 20. 1825.

he is called after John and his issue; but his character is heir after Lord James, yet that character he could not reassume without reducing the deed 1780. But the plea of prescription is not from necessity maintained by the appellant. Sir Hew surrendered his right to the Bargany estate, advisedly, and for a good consideration; and after having enjoyed the benefits of that transaction, it is impossible that he can reduce or recall it. He bartered away, abandoned, and renounced his *jus crediti* for an onerous equivalent. The defences reserved to the respondent by the judgment of the House of Lords are already answered.

Respondent.—After the House of Lords had ascertained the right of Sir Hew Dalrymple (son of Joanna) to the estate of Bargany, as the heir-female of John Lord Bargany, there was a *jus quæsitum* established, not only to him, but to his descendants to the last generation, as heirs of tailie, that the right of succession in the estate of Bargany could never pass to other heirs so long as there were in existence any descendants of the sons of Joanna, subject no doubt to a declaration of irritancy for contravention, but to that only. Such an irritancy the appellant endeavoured to have declared; but she was unsuccessful. It must therefore be assumed, not only in words, but in truth and reality, that there has been neither contravention incurred, nor irritancy declared. But the appellant, although she cannot but admit this, rests her principal arguments on the assumption of the reverse. Her claim is unfounded, 1. Because, according to the clear legal import of the destination in 1688, the respondent is unquestionably heir of that entail, and has the only right to succeed to and possess the estate of Bargany. He is the substitute heir, who did not exist in 1740,—who never repudiated the succession,—for whom no repudiation was or could be made,—and against whom no irritancy was ever declared or can now be declared. The appellant, therefore, must shew that the respondent has been excluded from the destination, before she can succeed in her suit. Because, 2. The respondent is heir called by the destination of the charter 1742. This is made clear by putting the question, whether the clause in that deed, ‘*quibus deficient aliis hæredibus quibuscunque ex corpore dict. dominæ Joannæ Hamilton procreat. inter illam et dict. dominum Robertum Dalrymple abaque divisione,*’ comprehend the whole other heirs possessing the character to which the description applies, besides John Hamilton and his issue; or whether they comprehend a part of

June 20. 1825. those heirs and exclude others? If all are comprehended, then clearly the respondent has the right of succession preferably to the appellant. Now, resolving this question by the fixed technical meaning of the terms employed, the answer must be favourable to the respondent: So decidedly and peculiarly technical are the words, that, even if they occurred in a last will, they would not let in presumption of intention, but receive their strict legal meaning. Nothing could be imagined more dangerous to the security of the public records than to admit the principle, that, notwithstanding such a plain destination, its meaning could be entirely altered, the title destroyed, and the estate eroded, upon matter of doubtful construction,—of inferences from the previous history of the charter,—of conjecture from the situation of the parties concerned,—the deduction of former titles,—and of assumed probabilities, insusceptible of ever being with certainty proved. The rule plainly is, to lean to the construction which includes, and against the construction which excludes heirs who would otherwise be called; and particularly here, where it was plainly John Hamilton's duty, in taking the charter 1742, to depart as little as possible from the deed of entail 1688, the meaning attempted to be given to the word 'other' has no foundation. The word used includes all the other children of Sir Robert and Joanna, and all the descendants of those children; and in this list the respondent stands. The clause of destination, and the sasine which followed, afford no means of discovering what it was which brought the title into the person of John. The words are fixed and inflexible, and create a good and valid special and original title. But the appellant endeavours to obviate this difficulty by going out of the record, and attempting from other deeds to controul and misconstrue the destination of 1742; and concludes, that when John took that charter to himself and issue, and then to the 'other heirs,' &c. he could only mean by those 'other heirs,' those called posterior, under the general destination in the entail 1688, to the heirs-female of the body of Lord Bargany. But this is unfounded in point of fact, and is plainly irrelevant in discussing a technical deed, intelligible in itself, and void of confusion or obscurity. The basis of her plea rests on the assumption of that which, after the judgment in the House of Lords, she cannot say in words,—that Sir Hew had forfeited for himself and his descendants: She insinuates that they were as if naturally dead. But there was no forfeiture. Then observe the absurdity into which she falls. She now

June 20, 1885.

says, that prescription has worked the charter 1742 into a good title in John, and protected him from the destination in the entail 1688. But if so, how can she controul the meaning of the charter by a reference to that very entail? If she has no prescription, she has no legal interest to reduce the deed 1780, because she would be excluded by the preferable title under 1688. If she has prescription, then she must confine herself to the charter 1742, and then the respondent is called preferably to her. How can she change the destination itself, by saying there was some ineptness or incompetency in making it in the terms it bears? There is plainly no impossibility in making an estate revert; and if the deed, which has been rendered unchallengeable by prescription, does order such reverting, how can a posterior substitute be listened to, pleading, that by previous titles the elder heir might have taken preferably to the party from whom the estates have now reverted. Besides, she cannot found on the investiture 1742, (which was John's own act), or John's own possession on it, as creating by prescription a title in her person to impeach the deed of John himself, and the investiture on that deed completed in his own person. A person can never prescribe against himself, nor against his own acts; because, since he has the possession, though there may be a title of prescription, it can never run in favour of another party against him; more particularly here, as all the rights of John under his investiture 1742 are carried to the respondent by the deed 1780. But there was not, in fact, possession on the investiture 1742 for forty years, for within that time John executed the deed 1780, which deed excludes the appellant, or rather lets in the respondent preferably. Sir Hew having assented to the service of John, is of no moment in a question with Sir Hew's descendants. If he had expressly repudiated for his descendants, they would not in any way have been affected. But he did not repudiate for them; on the contrary, he reserved for them. Let the appellant shape her arguments as she may, they rest on the postulate, that there was a declared contravention and forfeiture: without that, she knows she must be excluded by the heir called before her, namely, the respondent. But even if the intention of John Hamilton and of Sir Hew could relevantly enter into the present question, the facts unquestionably prove, that nothing could be more distant from their views than letting in the appellant previous to Sir Hew's descendants, or to Sir Hew himself, if John and Robert died without issue. John never contemplated irritating Sir Hew's right. If he had, he would have introduced a clause

June 20. 1823. for that purpose into his declarator. What induced Sir Hew to renounce is of no importance. It would seem that truly he need not have done so. He had made up titles to the North-Berwick estates, without inserting in his service the clauses in the contract 1707 concerning the succession to the estate of Bargany. No doubt the President afterwards imposed new conditions, but in doing so he exceeded the powers reserved to him; and these new conditions never were recognized by Sir Hew, nor was the deed imposing them allowed to enter upon record. Indeed this document, whatever might have been its importance in the question as to contravention and irritancy, can have none in the present discussion. It cannot affect, one way or other, Sir Hew's descendants. The plea of onerosity of the transaction, is irrelevant in a question with Sir Hew's descendants, and has no foundation in fact. The deed of repudiation is the one which shews the intention of parties. To obviate the effect of the reservation it contains, the appellant alleges, that the respondent has lost the benefit of it by prescription; but the years had not run; nor, taking the true legal import of the deed 1742, has the appellant any title on which prescription can run in her favour against the reservation. On the other hand, the respondent is in a situation to fortify himself by prescription against the appellant. But even supposing that the destination of the deed 1742 could be so construed as, in point of form, to give the appellant a title of succession in preference to the respondent, she, in taking by such a title, would necessarily represent John Hamilton, the maker of that charter, and would, as his representative, be liable to fulfil the express condition of the deed of repudiation and decree of declarator, by restoring the estate to the respondent; and that obligation is not cut off by the negative prescription. And even holding that the appellant, taking by that title, were not bound to restore the estate to the respondent, he would be entitled to set aside that investiture, on the ground of its having been inept and null from the beginning, and in prejudice of the respondent's right as heir of the entail 1688. And this title in the respondent is not excluded or cut off by any prescription, neither by the positive nor by the vicennial. For the former, there was no ground in point of fact; nor were there any termini habiles on which to rest it. The latter is evidently quite inapplicable to the circumstances of the case; and indeed the appellant's legal argument on the point is altogether fallacious. Independent of

June 20. 1825.

all these views, the claim of the appellant is directly inconsistent with the substantial provisions and the avowed design of every deed on which either party have founded.

The House of Lords ordered and adjudged, ' that the interlocutors complained of be affirmed, with the following correction, ' namely, in the interlocutor of 12th of February, signed 17th, ' February 1824, by leaving out, after the word " according," the word " both;" and after the word " construction," the words " and its true intention." '

LORD CHANCELLOR.—My Lords, There is a case which stands for judgment this morning, which I may truly represent to your Lordships as being one that I have never in the course of my professional life paid more anxious attention, or to any thing that was ever proposed to me for my judicial consideration, than I have paid with reference to this case; and it is a case which, as it seems to me, from the first till very nearly the last, has been very unfortunately conducted indeed. I mean the case of Fullarton v. Hamilton.

The judgment, my Lords, of the Court of Session, against which the appellant has entered the present appeal, is expressed in these terms :— ' The Lords having considered the remit from the House of Lords, the ' memorials for the parties on the whole cause, and the relative deeds ' and writings therein referred to, with the unanimous opinion of the ' consulted Judges.' That expression, ' the unanimous opinion of the ' consulted Judges,' is to be explained by informing your Lordships, that by the judgment of this House, when the cause was remitted to the Court of Session, by a condition in which the cause stood, they were required to take the judgment of all the other Judges upon certain points therein stated; and the judgment states, that ' with the ' unanimous opinion of the consulted Judges, find, that the defender, ' under the destination of the entail executed by John Lord Bargany ' in 1688, and the judgment of the House of Lords in 1739, is the ' nearest heir of tailie and provision now in existence entitled to ' the succession of the estate of Bargany, as the descendant of the ' body of the eldest heir-female of the body of the said John Lord ' Bargany.' And I presume that it is correct, that if the libel stood upon the deed of 1688, and the judgment of this House in the year 1739, there can be no doubt that that finding was right, as it stood upon the deed of 1688, and the judgment of the House of Lords in 1739; ' and that no contravention, irritancy, or forfeiture, ever was ' declared against him, his father, or grandfather, although an action ' for that purpose was brought, in which the defender's father and others ' were called as defenders, and in which decree of absolvitor was pronounced by the House of Lords.' This, my Lords, is likewise a proposition in this judgment which I apprehend it is impossible to con-

June 20. 1825. tradict, after the formal judgment of the House of Lords; and so I see the fact is taken to be by all the Judges who were then consulted on this question. Then they find, 'that this being the case, no act whatever of Sir Hew Dalrymple, the defender's grandfather, could affect the interests of any of his descendants being heirs of tailie.' That, my Lords, is a pure matter of law. 'Find, that nothing following from the deed of repudiation of Sir Hew Dalrymple, the decret of declarator, or retour of John Hamilton's general service, could in law deprive the defender of his right of succession under the entail.' That is also a pure matter of law. 'Find, that the defender, by the destination of the charter 1742, is, according both to its legal construction and its true intention, called to the succession of the estate after John Hamilton and the heirs whatsoever of his body.' With respect, my Lords, to this finding, in the proposition just stated, I apprehend it must be admitted, that if the defender is, according to the legal intention of the deed, and the legal construction of the charter, entitled to the succession of the estate after John Hamilton, the heirs of his body being now out of the question, I think it will be impossible for a lawyer to doubt, if it be so according to its legal construction, it must be so according to its true intention, according to the notion of an individual who may be considering merely what the parties mean; but it must be so according to its legal construction as indicative of the intention. But it is quite obvious that the Court meant here, that the defender was not only called to the succession according to the legal construction of the charter of resignation, but that he was called to it by what the parties had done with respect to that succession. And they then state, 'and that if it were now necessary, for the purpose of completing a title in his person, it would be in the power of the defender to obtain himself served heir of tailie and provision to John Hamilton as the person last infeft in the estate.' What is stated in this part of the judgment is probably, I may say certainly, intended to meet a difficulty represented to exist by some speeches made in this case when the last judgment was given in this House, and to which I shall take the liberty hereafter to refer your Lordships. Then they proceed, that they 'find, that even if the pursuer could constructively be held entitled to the benefit of the destination in the charter 1742, her right has not been secured by the positive, nor that of the defender to set aside the whole proceedings cut off by the negative prescription; and that the vicennial prescription of retours is not applicable to the case; and therefore that the pursuer can have no title or interest to challenge the deed executed by John Hamilton in 1780, by which the defender's grandfather, and the heirs whatsoever of his body, were directly called to the succession on the failure of John Hamilton, and the heirs whatsoever of his body; but find, that for defending himself in this action, it is not necessary that the defender should institute any process of reduction.' That, I apprehend, my Lords, is inserted in the present judgment to meet some words to be

June 30. 1825.

found in the judgment of the House by which the case was remitted to the Court of Session. 'They therefore sustain the defences now pleaded for the defender against the action, assoilzie him from the whole conclusions, and decern.'

My Lords,—Your Lordships will find, that in this case a title was to be made originally under an entail, which was executed so long ago as the year 1688. It is not my intention, nor is it indeed necessary, to state to your Lordships what was the destination or succession which is thereby provided for; for I think it is unquestionable, that if subsequent instruments had not given rise to the question that has taken place in this cause, there could not be any doubt, according to the succession there pointed out, that Sir Hew Dalrymple would be the heir of tailzie entitled to take the estate. It appears, however, that in this family, which seems to have had very large property, there is an estate called the North-Berwick estate; and by the entail of that estate it was provided, as far as human foresight and ingenuity could effectuate such a purpose, that the same persons who took the estate of Bargany could not take the estate of North-Berwick, if they did not comply with certain conditions:—if they did not comply with those terms, they should lose the estate of North-Berwick, and not enjoy both.

My Lords,—Passing over what took place in 1786, and all the deeds to which my Lord President referred, and adverting, as I will do only in a single word, to the judgment of this House of 1799, by which it was decided, 'that the estate of Bargany did descend to the said Sir Hew Dalrymple, the eldest son of the daughter and only child of John Master of Bargany, and that he ought to be served heir of tailzie and provision to the said James Lord Bargany;' it appears that one of the heirs of tailzie, Sir Hew Dalrymple, demanded the Court to decree to him the most valuable estate, namely, the North-Berwick estate. Sir Hew Dalrymple executed a deed in the year 1740; which is known in the cause by the title of the deed of repudiation, bears date the 13th of August, is registered 11th of November 1740, and it recites the entail of the Bargany estate, and likewise recites the entail of the North-Berwick estate: it then proceeds to state,—'Sir Hew Dalrymple having duly considered the aforesaid tailzie of the estate of North-Berwick, contained in the aforesaid contract of marriage, and also the tailzie of the estate of Bargany above-mentioned, dated 19th day of June 1688 years; and that it appears to have been intended by the parties to the contract of marriage betwixt the said Sir Robert Dalrymple and Mrs Joanna Hamilton, my father and mother, that the said two estates of North-Berwick and Bargany should be separately taken and possessed by the heirs of the marriage betwixt the said Sir Robert Dalrymple and Mrs Joanna Hamilton, except' (which goes to the exception)—'except in the cases therein excepted; and that in case I should now take the succession of the estate of Bargany, I would thereby forfeit the right

June 20. 1825. ' to the estate of North-Berwick for myself and my descendants, in favour of John Dalrymple, counsellor at law, my brother-german; and I being fully resolved to take and hold the estate of North-Berwick, and to allow the estate of Bargany to descend to and be taken by the said John Dalrymple, in the terms of the entail of the estate of Bargany; therefore, and for the love and respect which I have and bear to the said John Dalrymple, and in consideration of the settlements of the estates of North-Berwick and Bargany above recited, wit ye me, with and under the provisions after-mentioned, to have repudiated, likeas I, by these presents, do repudiate and refuse to accept of the succession of the said estate of Bargany, and that to and in favour of the said John Dalrymple, the next heir of tailie in the said estate.' At the time that this deed was executed, the Bargany estates were in possession of the person who executes this deed, and (as an English lawyer would express himself) with remainder to John Dalrymple and heirs of his body; and (as the same English lawyer would say) remainder to Robert Dalrymple and the heirs of his body; and the repudiation is, that he repudiates and refuses to accept of the succession of the estate of Bargany, in favour of John Dalrymple the next heir of tailie; and he consents ' that the said John Dalrymple shall, in respect of my repudiation aforesaid, serve himself heir of tailie and provision to the said James Lord Bargany, and otherwise make up titles in his person to the estate of Bargany, in such manner as is competent of the law, and as he shall be advised; and that the said John Dalrymple do instantly take possession of the said estate of Bargany, and uplift the rents thereof in the tenants' hands fallen due since the death of the said James Lord Bargany, and in time coming.' If I rightly recollect the facts of the case, Sir Hew Dalrymple himself uplifted the rents in the tenants' hands which had fallen due. The operation of these words would certainly strike the mind of an English lawyer, if it were an English case, in this way,—that the estate having been limited to him and the heirs of his body, he meant to say, that he gave up the estate for the heirs of his body, and he intended that John Dalrymple should take an estate tail, excluding himself and the heirs of his body; and in case of John and the heirs of his body failing, that then Robert Dalrymple, his third brother, should take the estate to him and the heirs of his body; and if that were the operation of the deed, Mrs Fullarton must have been entitled to the estate. But this instrument goes on to provide in the manner following:—and it is fit here to observe, that there may be, as there certainly is, a very great difference between the operation of an English deed, where the limitation is to a person and the heirs of his body, and a Scotch deed, where the limitation is to a person and the heirs of his body.—Then follows this proviso: ' Providing always, that these presents shall noways prejudice my own, or my descendants, our right to take the succession of the said estate of Bargany, upon failure of the said John Dalrymple, and Dr Robert Dalrymple my third brother, and

‘their descendants; or in case any event shall exist, in which I or my descendants can take the said succession consistent with the fore-said taillie of the estate of North-Berwick.’ So that the meaning of this deed of repudiation was this—when I say the meaning of it was this, I should say the meaning which an illiterate person in Scotch law would put upon it would be this—I, Sir Hew Dalrymple, am entitled to this estate of Bargany as heir of taillie under the deed of 1688; that estate goes to the heirs of my family; I, Sir Hew Dalrymple, do, for certain reasons herein stated, repudiate and refuse to accept of the succession of the said estate of Bargany, in favour of my brother John Dalrymple, the next heir of taillie in the said estate of Bargany. Your Lordships will observe, that he renounces for himself,—whether he could renounce and repudiate for the heirs of his body, is another question; but here is no repudiation for the heirs of his body in express terms. But his meaning seems to have been this, probably thinking he could repudiate for the heirs of his body; he meant to say, that John and the heirs of his body shall take, and Robert and the heirs of his body shall take; and to reserve expressly to himself and the heirs of his own body an opportunity of taking after John and the heirs of his body, and after Robert and the heirs of his body had enjoyed the estate; and not only in the particular cases so pointed out, but also to resume his right by going to the heirs of his body, that they should likewise be able to resume his right upon any conditions on which they could resume that right consistently with the holding the estate of North-Berwick. What I mean to state is, that they were to have the power of resuming his right, as far as they could consistently with the terms of the entail; that is, if he Sir Hew Dalrymple could take those estates together.

But, my Lords, the question must also be looked at in another point of view, whether Sir Hew Dalrymple, having made this deed of renunciation, he could take the estate again consistently with the entail of the estate of 1688? whether, on the other hand, there was no such contravention, irritancy, or forfeiture of the Bargany estate, that he could never take that estate again? And if contravention, irritancy, or forfeiture has taken place, another question in this case is, whether that innovation is an alteration which can be pronounced to have taken place in other manner of character than that of a forfeiture?

My Lords,—With respect to the action that was brought, I own I cannot get the impression off my mind, which was made very early when I first became acquainted with this case—certainly that is a very long time ago,—shortly after I had the honour of sitting upon your Lordships’ Woolsack. You were recommended to adopt the judgment you did, by my Lord Loughborough and my Lord Thurlow, two individuals now no more. The impression then made on my mind, which was an impression I expressed very strongly when we sent this case back to the Court of Session, was this,—that the intention of Sir Hew Dalrymple was, that the estate should be taken, under the effect of this

June 20, 1825. limitation, by John Hamilton and the heirs of his body, the heirs of taillie, and then by Robert and his heirs of taillie, expressly reserving his right to take back after John and Robert; that if the deed had stopped there, it must have been clearly his intention,—his actual intention, not stating what the law would say was his intention,—that John and Robert, and their descendants, should take, before he and his descendants were to take again if any opportunity occurred, that which he so repudiated, and that he should be at liberty to resume it again. What I mean by that is only this, that he could not, (as it appeared to me, and I am still obstinate enough that it appears to me), according to this deed, if he repudiated, and the deed of resignation which was to take place, under the words 'other heirs of taillie'—(to be found in the instrument that I shall next observe upon)—mean the heirs of his body,—his descendants as the heirs of his body,—and under the effect of those words,—(what may be the legal effect of them is quite a different thing),—but that, under this instrument, the heirs of his body were to come in as heirs of taillie, and take the estate after a certain event. But I am sure it will be in the recollection of your Lordships, that when you sent this case back again to the Court of Session, that I never uttered one single syllable upon that which appeared to me to be the actual intention of the framer of this instrument, without carefully guarding that expression with respect to its right to any operation or no operation by stating, that it might be one thing what was the actual intention, and another thing what was the legal effect, of an instrument, which legal effect is in truth that which is to be taken by lawyers to be the declaration of the intention of the parties; because that which is its legal effect is that which must be presumed to have been intended; and if an individual can be ever so well satisfied of what was the personal intention, the legal intention is that which must give judicial effect to it.

My Lords,—One circumstance struck me extremely, which was this:—Suppose that John had died within a month after these deeds had been executed, and that Robert was still alive, it would be difficult to say, that, according to the actual intention, it gave a right to Hew to take before Robert; yet I cannot deny, upon such a circumstance happening, that is, John's death within a month after the execution without heirs, according to the legal effect of this deed of repudiation, and of others which followed consequently upon it, if Hew could resume, or his heirs if he were dead, it would be impossible, upon an impression which an individual might have as to the personal intention, to decide against that impression which arises from the legal effect of an instrument, and to which a Judge is obliged to submit.

My Lords,—This deed of repudiation was followed by instruments, which, in the minds of English lawyers, would have had considerable effect in this cause; for there is scarcely a word in them but what it is material to look into; so that it is quite impossible to overlook them, even if our attention had not been called to them, and if they had not

been alluded to by the Counsel at the Bar. There is the charter of resignation, dated the 26th July 1742, and the retour of John Hamilton's service; and it is unquestionable that in this instrument John Hamilton was tied up from doing any act contrary to the succession, which was pointed out in the most express terms. Then that is followed by a deed executed by John Hamilton, dated 21st June 1780, which is an instrument the particulars of which I do not mean to detail to your Lordships, as you are fully aware of them; for the deed of 1780, the charter of 1742, and various other instruments, formed the ground, as I understand it, of the cause when it came here some time ago. I allude now to what passed in 1801. In 1801, it was observed, that Mrs Fallarton was suing upon a notion that there had been a forfeiture. The Court of Session, upon that occasion, as they have done upon other occasions, proceeded thus; that is to say, they entered into the consideration first, not whether the pursuer had a title to pursue, but whether the defendant had a title to exclude; and when the case came before the House of Lords, Lord Thurlow, who seems to have been very much out of humour by that mode of proceeding, intimated an opinion, that though he did not mean to say the pursuer had a title to pursue, regard being had to the summons, and to what was laid before your Lordships, yet he thought it was a singular thing that the Court of Session should put the defendant to shew he had a title to exclude. I recollect that he made use of some rather harsh terms, though he meant it in very good humour; that by pursuing that course, perhaps ten years might be employed to ascertain whether the defendant had a title to exclude; and after coming to the end of ten years, it then would require ten years more to determine whether the pursuer had a right to pursue, and the judgment was in this form.—I am speaking from memory only, but the operation of it, I think, was this,—namely, that the cause should go back again, and the Court of Session should be directed to consider whether the pursuer had a title to pursue. My Lords, upon the Court of Session deciding that the pursuer had no title to pursue, it then came back to this House upon an appeal from that decision, and the judgment of this House affirmed what had been done in the Court of Session. Now, whether the judgment of this House affirming what was done in the Court of Session was right or wrong, or whether that judgment so affirmed is right or wrong, is matter of no consequence in the discussion of the present question; because I take it to be extremely clear, that your Lordships are bound by that judgment to the full effect of it; and if that judgment imports that Sir Hew Dalrymple was not guilty of a contravention of the entail, you not only have no judgment which you can call a forfeiture, but you have a judgment expressly finding that there is no forfeiture; and having a judgment finding there is no forfeiture, it then remains for Mrs Fallarton to put her claim upon any other ground, and bring a new action, and in that action making use of a summons differing in its allegations and con-

June 30. 1825.

June 20, 1825. clusions, stating another ground of action, and affirming that she was entitled on another ground of action. She accordingly did so, and the Court of Session were of opinion that she had no right. That led to another appeal to this House; and upon that appeal coming before your Lordships, you were pleased to give a judgment, which was in the year 1816—No, I am mistaken; it was then that the action was brought, and it stated the grounds of that action, which it is not necessary for me to repeat; for you will learn by the judgment in 1822, by which you remitted it back again, on what grounds you held that she was not concluded by what had passed in the former action. That judgment, my Lords, was stated in this way:—‘ The Lords Spiritual and Temporal, in Parliament assembled, find, that the judgment of this House on the 3d of June 1801, in the matter of the petition of appeal then before the House, in which the present appellant, then the wife of Colonel William Fullarton, and the said William Fullarton, were appellants, and Sir Hew Dalrymple Hamilton, Baronet, was respondent, whereby it was declared and found; that the matters in the then appellants’ summonses were not sufficient to sustain the conclusions in those summonses, or any of them, and therefore this House assolizied the defenders, appears to have proceeded only on the insufficiency of the matters in those summonses to sustain the conclusions therein; and find, that such judgment, therefore, did not affect the rights of the appellant in any future action, founded on other grounds of action: And the Lords further find, that the action of the appellant, which is the subject of the petition of appeal now before the House, is founded on the decret of declarator of the 25th of February 1741, the retour of service in pursuance of such decret, finding John Hamilton, second son of Robert Dalrymple, procreate of the body of Joanna Hamilton, the lawful and nearest heir of taillie and provision to James Lord Bargany, deceased, according to the matrimonial contract of 19th June 1688, and under the charters of resignation obtained by the said John Hamilton, by virtue of the procuratory of resignation contained in the said matrimonial contract; by which charters the lands and barony of Bargany, and other lands therein mentioned, were granted to the said John Hamilton, by the description of second son of Robert Dalrymple, procreate between him and Joanna Hamilton, and so heir-female of John Lord Bargany, and the heirs whatsoever of the said Joanna Hamilton’s body; whom failing, to the other heirs whatsoever of the body of the said Joanna Hamilton, procreated between her and the said Robert Dalrymple, without division: and the appellant, by her summons, now insisting that the said John Hamilton was at the time seized of the lands in question, so held to him and the heirs of his body, according to the limitations in the said marriage-contract of the 19th June 1688, and the subsequent heirs of entail called to the succession after him and the heirs of his body, by the terms of such marriage-contract, in exclusion of Sir Hew Dalrymple, deceased, the eldest son of the said Robert

June 20, 1825.

‘ Dalrymple and Joanna Hamilton, and the heirs of his body ; and that
 ‘ according to the true construction of the said charter of resignation;
 ‘ and investiture of the 29d of August 1742, and by virtue of the
 ‘ limitation therein contained, on failure of the said John Hamilton
 ‘ and the heirs of his body whatsoever, to the other heirs whatsoever
 ‘ of the body of the said Joanna Hamilton, procreated between her and
 ‘ the said Robert Dalrymple, the succession under the said charters
 ‘ devolved to such person as, under the said marriage-contract of the
 ‘ 19th of June 1688, was entitled to succeed to the said John Hamil-
 ‘ ton, and the heirs of his body, according to the order of succession
 ‘ prescribed by the said marriage-contract ;—that is to say, the said
 ‘ Robert Dalrymple, the third son of the said Robert Dalrymple, the
 ‘ father, and Joanna Hamilton, and the heirs of the body of the said
 ‘ Robert Dalrymple, the son ; whom failing, the said appellant, as the
 ‘ next in succession to the said John Hamilton and the heirs of his
 ‘ body, the said Robert Dalrymple, his brother, having died without
 ‘ issue in his lifetime ; and that the appellant had only the right to be
 ‘ served heir of entail to the said John Hamilton, the last person
 ‘ seized of the said lands under the said marriage-contract of the 19th
 ‘ of June 1688, and according to the true construction of said charter
 ‘ of the 26th of July 1742, and other charters from the subjects-super-
 ‘ iors libelled on in this case. Therefore the Lords find, that the
 ‘ judgment of the House, on the petition of appeal depending before
 ‘ the House on the 9d of June 1801, does not preclude or affect the
 ‘ question, whether the appellant is now entitled to claim the said
 ‘ lands according to the title insisted on by her summons in the action
 ‘ which is the subject of her present petition of appeal, without preju-
 ‘ dice, however, to the right, if the respondent hath any, under the
 ‘ deed of repudiation of the 13th of August 1740.’ My Lords, when
 I read to you these words, it recalls to my attention that these words,
 ‘ without prejudice to the right, if the respondent hath any, under the
 ‘ deed of repudiation of 13th August 1740,’ were suggested as words
 proper to stand as part of this judgment, in consequence of a pretty
 strong opinion, which I before alluded to, having been expressed ; and
 not only in consequence of that opinion, but also the opinion of ano-
 ther Lord, who took occasion upon this subject to state, that the in-
 tention of that deed of repudiation was not an intention which would
 limit to the heirs of the body of Sir Hew Dalrymple, under the words
aliis hæredibus quibuscunque, the estate in question,—I say the actual
 intention perhaps might have meant that, though, as I have before
 stated to your Lordships, I do not wish to look at actual intention,
 unless that actual intention be such an intention as the law would con-
 sider to be such. The next words are, ‘ or the right, if any, he now
 ‘ hath to reduce the said decreet of the 25th of February 1741 ; or
 ‘ the retour of service in pursuance of such decreet ; or the said char-
 ‘ ter of the 26th of July 1742 ; or the right, if any he hath, under the
 ‘ limitations contained in the said charter of 1742 ; or under the deed

June 20. 1825. ' of the 21st day of June 1780 ; or the infestment of the 24th and 25th ' of October 1780 ; or under the other charters from subjects-superiors ' libelled on in this case.' With respect to these words which I have last read, ' without prejudice to the right, if the respondent hath any,' &c. they are words that were used, in order that it might not be overlooked that this House was not then instructing upon a question, whether there was a right to reduce, or whether there was a necessity to reduce ; nor with reference to the question, whether an action of any kind whatever was necessary ; but the whole was to be left open to the Court of Session. And I feel myself bound to take notice of that, for I find, in some parts of the printed papers, that it is stated as if it were supposed that this House gave a judgment that there was no right, whereas it was meant that it should be left to the consideration of the Court below.

My Lords,—The House was pleased to order, that the cause should be remitted back to the Court of Session in Scotland, and that the Judges of the Division to which this cause was remitted, should require the opinions of the Judges of the other Division of the Court in the matters or questions in this cause ; and it was further ordered and adjudged, that the cross appeal should be dismissed this House ; and the same was accordingly dismissed with costs.

My Lords,—It cannot surprise any body, that when this cause went back to the Court of Session, that, in the first place, as the purpose of the original suit was to have a declaration of contravention and forfeiture, they thought it necessary there should be a suggestion as to the claim made upon the action, and that the case, when it was so put, being put upon alternative grounds, (if I may so express myself), and as those who had originally judged the case were of opinion there was no contravention—nothing upon which there could be a declarator of forfeiture,—and would in all probability think that there was no other ground upon which the pursuer could succeed, they were entitled to look at the case as a case in which they were to construe the several instruments according to the meaning and intent which the law put upon them ; but (what is more material) that whether the judgment was right or wrong in the first instance, this was a case in which there could be no such contravention and forfeiture. Then the case came to be considered, what was the actual intention of the parties under the deed of repudiation, and what was the actual intention of the parties under the charter of resignation. The first question was, what was the actual intention of the parties ; and the next question was, how far that actual intention, if that intention is to be taken to be in favour of Mrs Fullarton, had been carried into effect, by instruments binding Sir Hew Dalrymple and the descendants of his body, in such a manner as to enable him to meet the grounds laid in this action.

My Lords,—I before stated, that this is a difficult thing to decide, and so difficult that I have not, I am free to confess, powers of mind

June 20. 1825.

sufficient fully to get over it with reference to what was the actual intention of Sir Hew Dalrymple and of John Hamilton, to look at this as a case in which Sir Hew Dalrymple, or the heirs of his body, were to reassume the possession of the estate in any case whatever, except in that case in which alone he could hold it consistently with the covenants and provisos contained in the entail of the other estate; and according to the judgment which I will now read to your Lordships, you must take it to be the intention, that if he had thought proper the next day to say, that I will not take the estate of North-Berwick, he had nothing to bind himself—nothing to bind those for whom he had not repudiated in form, but whose right he had deserted; but if the law is, as it has been declared to be, whatever speculations your Lordships may have as individuals as to the probable or the true intent of those instruments, you must lay those speculations aside, and give effect only to the legal construction of the instruments.

When this came again before the Court of Session, they took all the points into consideration, requiring at the same time the judgment of the Judges of the other Division. The Judges who were so consulted, accordingly gave their opinions. It does not seem altogether reasonable to pass over the effect of the former suit, without considering it to this extent, namely, what in all probability was the opinion which was then entertained upon the case. Laying that aside, however, for a moment, I will advert to the opinion given by thirteen out of fifteen of the Judges, which was to the following effect, namely—They say, that they 'hold it to be a fixed and unalterable point, that 'neither by the transactions assumed as the grounds of the charter '1742, nor by that charter, was there a contravention committed 'by Sir Hew Dalrymple against the entail 1688. Secondly, As Sir 'Hew did not forfeit, he and his descendants still continued the 'nearest and true heirs under the entail 1688, though by the charter '1742 they lay under a temporary and defeasible exclusion.' They then say, 'The deed of repudiation by Sir Hew did not deprive him 'or his descendants of their character as heirs of entail.' They then go on to say, 'In point of fact, Sir Hew did repudiate only for himself 'personally, and not for his descendants, the right of whom, under 'the entail 1688, was expressly reserved.' Then there follows: 'Sir 'Hew's repudiation for himself personally was further qualified by a 'reservation of his own right under the entail 1688, and of his power 'to assert it whenever he thought proper.' Then they say, that in point of law 'Sir Hew could not renounce for his descendants by the 'deed of repudiation;' and then they give their reasons for that; and they conclude upon that, that 'the present Sir Hew, who was not 'included in, nor affected by the deed of repudiation by his grandfather, remains the true heir under the taillie 1688.' This proceeds upon an opinion, that Sir Hew could not renounce for himself and his descendants, by the deed of repudiation, by the law of Scotland; but if the renunciation is not a forfeiture, then arises the question upon

June 20. 1825. which the opinion has been given, which seems to be right, that if the repudiation is, not a forfeiture to the descendants, then the question would be, whether the descendants have not the liberty of claiming, notwithstanding one heir of tailie may have repudiated for himself. They then likewise state, that they 'are clearly of opinion that Sir Hew is the true heir under the charter 1742;' and they put it both upon the grammatical construction, and upon the technical construction of that instrument. My Lords, I should detain you a long time were I to comment upon the grammatical construction; but it is another thing, whether it is not so upon the technical meaning. They say, 'But even in the case of ambiguity in the expression of an investiture upon an entail, we hold it to be quite clear, that a deviation from an original entail is never to be presumed.' Then it is said, it is argued by the pursuer, that succession cannot revert or ascend;—but a question may arise, whether it might admit of a construction without saying that succession cannot revert or ascend—I mean in those cases in which it has been decided, that an heir of entail takes an estate by reason of his being heir of entail when he comes into existence; and therefore the former must be excluded from the estate, and has no right to retain possession of the estate at all from him who takes in the order of succession after him; and then that person contends in strict law, that he neither has, nor could, in this way, operate a forfeiture—no declaration of forfeiture having been made—that he neither had, or could have forfeited for his descendants. Then, to be sure, the descendants who had come into existence would be in a situation very similar to that in which parties are placed in cases to which I am alluding,—that they are not bound by Sir Hew's act, because they were not in the world to consent to such act. Then they state in their opinion what is the situation of those heirs whose rights have been for a time usurped. Then, my Lords, they go on to argue upon the actual intention, according to their construction of the instrument. They then farther state, that there are but two ways by which an heir of entail can be deprived of his right to succeed to the entailed estate: They say, 'An heir of entail cannot be deprived of his right to succeed to the entailed estate, except in one of two ways, either by an irritancy and forfeiture declared against him, or against his ancestor, and directed against that ancestor and his descendants; or, secondly, by prescription, as a foundation for which the law requires that the estate should be possessed for forty years continually, and without interruption, under titles and an investiture by which the heir is excluded from the succession. In this way, and in no other, can prescription operate against the heir.' They then proceed to state their opinion with respect to the doctrine of prescription. Then they go on to dispute the validity of the charter 1742; and they state it as their clear opinion, that it was not necessary for Sir Hew to bring an action to reduce the deed of 1742; and they are 'very clearly of

‘ opinion, that no difficulty arises from the retour of John Hamilton, June 20. 1625. as being fortified by the vicennial prescription under the Act 1617; but with respect to the vicennial prescription, they make a great variety of observations as the ground for the opinion which they have given as to the effect of it. Then they state, that the ‘ disposition of 1780 is a good title if Mrs Fullarton cannot set it aside, which she cannot; because we hold it to be clear, that Sir Hew can reduce the charter 1742, which is, Mrs Fullarton’s only title, if it shall be held to exclude him, and revert to the original entail; of consequence she has no interest to reduce the deed 1780, even if she were called in preference to Sir Hew by the charter 1742; and we are clearly of opinion, that Sir Hew was called before her by that charter. Secondly, He may be served heir of provision under the deed 1742. We have no doubt, as already mentioned, that it is competent to the true heir to make use of the feudal title erroneously made up by an usurper, as a convenient mode of making up his own title; or, thirdly, Reducing that investiture, and disregarding it altogether, he may be served heir to James Lord Bargany under the entail 1688.’ This opinion, my Lords, is signed by the Lord President, by Lord Hermand, by Lord Succoth, by Lord Balgray, by Lord Gillies, by Lord Alloway, Lord Cringletie, Lord Meadowbank, Lord M’Kenzie, and by Lord Eldin. My Lord Pitmilley, and my Lord Glenlee, and my Lord Justice-Clerk, three of the Judges in the other Court, concur in the opinion which has been given by all the other Judges who did not form constituent members of that Court. On the other hand, there are two opinions, exceedingly powerful, given in opposition by Lord Robertson and Lord Craigie; and no man can deny to them the character of great ability. The question for your Lordships now to determine is, whether you will adopt the opinion of the two, or adopt the opinion of the thirteen. That question is not, whether, because there are thirteen one way, you are to adopt that opinion, and not the opinion of the other two; but whether, upon the whole, your Lordships are of opinion that the judgment of the thirteen is, as far as we can understand the Scotch law, which we ought to be very attentive to, the better opinion. My Lords, I have not the slightest difficulty upon the subject in reading this instrument. I do think that there has been no forfeiture incurred by what has been done, though various things may have been done which have been prohibited by this deed; yet it is quite a different thing, whether a party who is an heir of entail under a Scotch deed, if he does that which he ought not to do, whether it can be effectually said that a prohibition against his doing that act can, in point of law, be attended with all the consequences which a party complaining of that act thinks is the legal consequence;—for instance, there may be a forfeiture for himself and for the heirs of his body; but the question is, whether those persons who are innocent parties, the heirs of tailie, can be excluded from a title, with reference to which they have done nothing to exclude themselves, unless there

June 20, 1825. be not only an act, but a judgment of law to that effect. Now, whether the first decision of this House was right or wrong, is a matter in which I shall not stay one moment to discuss; but I take the judgment to have declared, that Sir Hew's act operated no forfeiture whatever. Then comes the question, whether, if Sir Hew's act operated a forfeiture, those who were the heirs of entail are or are not the persons who are entitled to the estate. Upon the best consideration I can give to this subject, and with respect to Scotch proceedings, I hold it to be my duty conscientiously to declare my own opinion, whatever that opinion may be. In giving that opinion, I know that I have sometimes had the misfortune to differ from the Court below, as I happened to do in the case of Agnew, and by which, perhaps, I have not increased my popularity. I know that my learned friend who sits upon the Woolsack will bear me out when I say—though I do not presume to suppose it was the best opinion that could be given,—that it was the best I could form under the circumstances at the time: right or wrong, however, it is a judgment that must be considered as binding. My Lords, the opinions of Lord Robertson and Lord Craigie, are opinions entitled to much consideration, and founded upon reasons which I would not say that I could fully and satisfactorily answer. But the duty I have to perform is to contrast the judgment of the many against the few, and not to adopt the judgment because it happens to be the judgment of the many, but to determine upon the view which appears to me best to speak the judgment of the Scotch law; in which, however, I may be mistaken. But in this case I am extremely happy to say that the result is, that in my humble judgment the opinion of the many is the better opinion of the two. I cannot but say, from the very unfortunate mode in which this case has been conducted from its commencement almost to its conclusion, it has received a degree of prejudice by not having been set agoing right at first; but with that impression I cannot avoid saying, that I ought to advise your Lordships to refer to it in pronouncing your judgment, though by so doing you are breaking in upon a rule which your Lordships know is a rule of this House, and which I mention in consequence of prejudices arising every day with reference to its judicial proceedings, namely, that it is not usual for your Lordships to give your reasons for your judgment.

There is one observation, my Lords, I forgot to make with respect to the judgment pronounced by the Court of Session. According as it now stands, they 'find, that the defender, by the destination of the charter 1742, is, according to its legal construction and its true intention, called to the succession of the estate after John Hamilton and the heirs whatsoever of his body.' If, according to the legal construction, he is called to the succession of the estate after John Hamilton and the heirs whatsoever of his body, that is quite enough. It rather looks as if they had been inserted for no other reason than because the true intention had been questioned. The words therefore are not

necessary; and I shall move your Lordships, that the word 'both,' and the words 'its true intention,' should be omitted in the affirmation of the judgment. I state that, because I profess that my concurrence in this judgment goes upon this ground, that whatever may be my individual opinion with respect to the real intention of these parties, I do not think that that real intention of these parties ought, under the circumstances of this case, to determine who should be called to the succession of the estate. But if that which is here stated be the legal construction of these instruments, the defender must have the estate; and that amounts to neither more or less than this, that Sir Hew Dalrymple and John Hamilton set about doing a thing which they have not effectually done, and which not having effectually done, he follows that out by other proceedings to render it so. But whatever might have been their intention, the legal construction of the instrument, though perhaps it may be at variance with its true intention, must, in my opinion, regulate your Lordships' decision. Therefore I humbly advise your Lordships to affirm the judgment which has been pronounced by the Court below, with those slight alterations which I have pointed out.

Appellant's Authorities.—2. Stair, 5. 25.; 2. Ersk. 3. 51.; Creditors of Brighton, June 30. 1739, (10,247.); Monro, May 19. 1812, (F. C.); 1617, c. 13.; 2. Stair, 12. 15.; 2. Bank. 12. 1., and 3. 55.; 3. Ersk. 7. 12. 74.; 2. Stair, 12. 15. 17. 25.; 2. Bank. 12. 1., 2.; 3. Ersk. 7. 4. 6., and 8. 15.; 3. Stair, 5. 12.; 3. Ersk. 8. 47.; Earl of Dalhousie, Jan. 13. 1712, (14,014.); M'Lauchlan, Jan. 12. 1757, (2312).

Respondent's Authorities.—3. Stair, 5. 50.; 3. Ersk. 8. 32.; Lord Mountstewart, Nov. 13. 1707, (14,903.); M'Kinnon, June 16. 1756, (6566.); M'Kenzie's Observ. Act 1617, c. 13.; 3. Ersk. 7. 19.; Lamb, Jan. 11. 1673, (10,984.); Cases in Dict. vol. vii. 397. v. Succession; Smith, June 30. 1752, (10,803.); Denham, Nov. 24. 1802, (11,220.); Yuille, March 4. 1813, (F. C.); 2. Craig, 15. 16.; 3. Ersk. 8. 48.; Earl of Selkirk, Jan. 8. 1740; reversed in House of Lords, (14,941.); Hay, June 20. 1771, &c.; affirmed, (15,425.); Hay, April 6. 1773; affirmed, (F. C.); Ball, March 6. 1806, (F. C.); Richardson, July 5. 1821, (1. Shaw and Bal. No. 131.)

EDGE—J. CHALMER,—Solicitors.

HONOURABLE MARIANNE MACKAY FULLARTON, Appellant.

No. 43.

SIR HEW DALRYMPLE HAMILTON, Bart., Respondent.

Inhibition.—The Court of Session having found an inhibition on a supplementary action nimious and oppressive, recalled it, and ordered it to be scored in the record, and marked on the margin as done by their authority;—The House of Lords affirmed the judgment in hoc statu, so far as it recalled the inhibition; but reversed it, so far as it found the inhibition nimious and oppressive, and ordered it to be scored on the record and marked on the margin.

June 20. 1825.

2D DIVISION.

AFTER the remit from the House of Lords on the 26th July 1822, the appellant Mrs Fullarton raised against the respondent, Sir Hew Dalrymple Hamilton, a supplementary action of removing, count and reckoning and payment, to the extent of L. 200,000, as the amount of rents and profits from the death of John Hamilton in 1786, inhibited on the dependence, and used arrestment to the amount of half a million sterling. The respondent petitioned and complained to the Court, that this measure was nimious and oppressive, and resorted to for the purpose of harassing and distressing him; and he presented a bill to have the arrestments loosed without caution. The Court found (1st February 1823), 'that the inhibition complained of is 'nimious and oppressive, and recall the same; ordain it to be 'scored in the record, and to be marked on the margin that 'the same is done by authority of the Lords;' and superseded consideration quoad ultra. On advising the bill, the Court held, that the arrestments ought to be loosed without caution, unless Mrs Fullarton should find caution on her part to answer for the damage resulting from keeping up the arrestments; and in consequence of this deliverance, found it unnecessary to pronounce further in the petition and complaint; and afterwards, on advising a reclaiming petition for her, (4th March 1823), adhered, and found her liable in the expense of the answers.*

Mrs Fullarton appealed the question of inhibition.

Appellant.—The inhibition and arrestment were used in a competent form. They were precautions which the appellant had a legal right to resort to. If the property of the respondent be entailed, then the inhibition can do him no harm. But, in point of fact, great part of it is held by him in fee-simple. Besides holding under the deed 1780, the appellant has no security against creditors, for that deed is not recorded. The appellant is not actuated by oppressive motives. The respondent is not to be regarded to be in bona fide, merely because he avers it.

Respondent.—The inhibition is altogether unwarranted. The appellant is in no danger, whatever be the result of the action. Besides, it was incompetent to raise it on the supplementary action. The nimious and oppressive nature of the proceedings is spoken out by the sum for which the diligence has been raised,

* See 2. Shaw and Dunlop, Nov. 241-2.

and the amount for which the arrestments have been executed. June 20. 1825.
Under any result, the bona fides of the respondent would protect him from repetition of bygone rents. If the appellant conceives she runs any risk from the deed 1780 not being registered, why does she not put it on record?

The House of Lords 'ordered and adjudged, that in hoc statu 'the interlocutors complained of, so far as they recall the inhibition complained of, be affirmed; and it is farther ordered and 'adjudged, that the said interlocutors, so far as they declare the 'same to be nimious and oppressive, and ordain it to be scored 'in the record, and marked in the margin, be reversed.'

Appellants' Authorities.—2. Ersk. 11. 2. 10.; M'Creadie, Jan. 27. 1747, (6960.)

Respondents' Authorities.—4. Stair, 20. 29.; 2. Ersk. 1. 25. 29.; Duke of Roxburghe, Feb. 17. 1815, (F. C.); Duke of Buccleuch, March 16. 1824, (2. Shaw's Ap. Ca. No. 8.)

EDGE—J. CHALMER,—Solicitors.

JOHN OUCHTERLONY, of Guynd, Appellant.

No. 44.

OFFICERS OF STATE, Respondents.

Kirk-Yard—Prescription.—A party, who had for more than forty years made use of part of the interior of an abbey belonging to the Crown, as a family burial-place, in virtue of a disposition a non domino, but which was not followed by sasine;—Held, (affirming the judgment of the Court of Session), That he was not entitled to a prescriptive right, or to prevent the Officers of State from taking possession of the ground, removing a wall, and clearing away rubbish,—they consenting to enter on the spot the remains of the dead found there.

AFTER the Reformation, and dissolution of the Romish church in Scotland, the abbacy of Aberbrothwick and its revenues were erected into a temporal lordship. King William the Third granted a lease of the yard, orchard, and arable ground and grass within the precincts, to Ferguson, the clergyman then serving the cure of the parish; and, after his death, the Crown granted to the Magistrates of Aberbrothwick, 'for 'supporting the church, and other public buildings there, the 'rent, use, and possession of the whole arable ground and grass 'within the said yard and orchard, for the whole years and 'space of 19 years complete, from and after the term of Martinmas in the year 1737, being the first term of Martinmas after 'the death of the said Mr John Ferguson, with full power to

June 21. 1825.

2D DIVISION.
Lord Cringletie.

June 21. 1826. ' the said Magistrates and Town Council, and their successors
' in office, to enter in possession, labour, and manure the said
' yard and orchard, or set and dispose thereof at their pleasure,
' during the space foresaid; and to uplift the rents, and grant dis-
' charges thereof, which shall be sufficient to the receivers, and
' generally all other things concerning the said yard and orchard
' to do, that we could have done before the granting hereof.
Afterwards the Magistrates obtained a feu of ' *predictum hortum
' et pomarium cum tota terra arabili et gramine inibi content.
' domibus super eundem edificatis et totis partibus et pertinen.
' ejusd. sicut per dict. Magistratos et Conciliam, et eorum te-
' nentes, nunc possessæ sunt.*' In 1770, ' a vote being stated
' (in the Town Council); if or not John Ouchterlony of Guynd
' should have 54 square ells of the ground of the Old Abbey Kirk,
' next the windows in the east end, for a burial-place? it was un-
'animously voted, that Guynd get a feu-right to be granted of
' the foresaid piece of ground, for payment of a yearly feu of
' 2s. 6d. sterling, by half-yearly payments.' Thereafter an irre-
deemable right was made out of that space, on payment of 30
years' purchase of the feu-duty. The disposition contained a
warrant for infeftment, but no sasine followed. The family en-
closed the spot with a wall, and used it as their burial-ground.
They were not heritors in the parish.

Many very wanton acts of destruction of the remains of the
Abbey having taken place, the attention of the Officers of the
Crown was drawn to the state of the ruins by Maule of Pan-
mure. The temporal lordship had become the property of this
family by grant from the Crown, in 1642, of the ' *dominium ba-
' roniam et regalitatem de Aberbrothok et abbatiam ejusdem præ-
' dict. cum pertinen. proprietatem hujusmodi comprehendens om-
' nes et singulas prædict. terras, dominia, baronias, burgum baro-
' niæ, et regalitatem, annuos redditus, molendina, multuras, silvas,
' piscationes, ecclesias, decimas, patronatus, jus regalitatis, aliaque
' suprascript. cum pertinen. a corona nostra et patrimonio ejusd.
' et a dicta abbatia de Aberbrothok, omnibusq. aliis beneficiis
' quibuscunque, ad qua eadem perprieus pertinuerunt seu quibus
' annexa fuerunt, cum omnibus actis annexationis generalibus
' et specialibus quæ extendi posserint ad dict. erectum domi-
' nium baroniam et abbatiam hujusmodi, feudifirmas, decimas
' decimarum,' &c. This right was forfeited, in consequence of
the Earl of Panmure's accession to the rebellion of 1715, and
reverted to the Crown, but again came by purchase into the
family. It was a matter of doubt whether, looking to the acts*

June 21. 1825.

of ownership by the Crown since the date of the grant, the Abbey itself, and its precincts, were conveyed, or merely the abbacy and lordship; but, without waiving his right, Mr Maule in 1814 applied to the Exchequer for the appointment of 'keeper of the said fabric of the Abbey, and the whole ground and precincts thereof, with full power to him to debar and prevent all persons whatsoever from taking down any part of the said building, or removing the stones thereof.' The result of the investigation which followed was the discovery that many encroachments had been made on the premises, and the site granted by the Magistrates to Gwynd was the place where the high altar had formerly stood, although now covered with rubbish to the depth of ten or twelve feet. The Sheriff of the county then proposed to Ouchterlony, that the wall encircling this place should be cleared away to the original floor; that the bones and remains of bodies there buried should be set apart, and re-interred below the floor, where, also, subsequent burials of the family should take place, and a railing to be erected that would not interfere with a complete view of the pillars, &c. Ouchterlony presented a bill of suspension of the proposed operations, and challenged the Crown's right and title. A declarator was then brought by the Crown. The Lord Ordinary, 'in respect there is a radical title in the Crown to the Abbey of Aberbrothock; that the only title which the Magistrates of Aberbrothock have to any part of the precincts or ground attached to that building is by grant from the Crown; that the only right that the representer (Ouchterlony) has, is by the grant from said Magistrates; and that the subject of the grant is within the nave of the Abbey, and which was not conveyed to them, and which of course they had no right to convey to the representer; that the representer cannot plead prescription, owing to his having no infestment of date to be sufficiently old to be the foundation thereof, nor indeed any sasine at all, so far as he has yet made to appear; and, lastly, that the small place claimed by him is no part of a church-yard, and it is even said by the respondents, (Officers of State), that the representer is not an heritor in the parish of Aberbrothock,' found, 'that the Officers of the Crown are entitled to inquire into the extent of the grant by the Crown; and that the representer, whose only title is dependent on that grant, is not entitled to found on the title of Mr Maule, from whom he derives no right; and that he (Ouchterlony) has no title to the burying-ground claimed by him; and ordained him to remove therefrom, and to take away his wall

June 21. 1823. 'surrounding it:' and the Court, (27th June 1823), in respect of the statement in the answers,* adhered.†

Ouchterlony appealed.

Appellant.—For above 150 years there has been a general practice of burying in the interior of the ruins; and it is no longer at the pleasure of any party to disturb the ashes of the dead. Besides, the appellant holds a written grant from the Magistrates of Aberbrothock, who, since the Reformation, have uniformly exercised the power of regulating all matters relative to the original public church-yard, and the ruins converted into a church-yard, and prescriptive possession has followed. The right did not require infeftment to perfect it; at any rate, the Crown have neither title nor interest to challenge; for the property of the Abbey is vested in Mr Maule.

Respondents.—The right to the Abbey of Aberbrothock is vested in the Crown. It was not conveyed to Mr Maule; and even if it were, the appellant cannot plead that defence. It was not conveyed to the Magistrates; and the disposition held by the appellant, therefore, proceeds a non domino. The act of converting the area into a burying-place was an usurpation; and the right to it could not be acquired by mere occupation and possession. Nevertheless, the respondents made the liberal offer to allow the appellant to inter below the pavement; but he rejected every arrangement.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors, so far as complained of, affirmed.

LORD GIFFORD.—My Lords, there is a case which was discussed some time ago at your Lordships' Bar, in which John Ouchterlony, Esq. is the appellant, and his Grace Alexander Duke of Gordon, and others, his Majesty's Officers of State for Scotland, are the respondents; and the question in this case was this, whether or not the appellant, Mr Ouchterlony, was exclusively entitled to a portion of the Abbey of Aberbrothock or Arbroath, which had been possessed by his ancestors as a burial ground? The respondents, who represent the Crown, contended, that that spot of ground was not the property of this gentleman

* This was understood to refer to the offer made by the Sheriff relative to the disposal of the remains which might be discovered on removing the rubbish, and the permission to inter below the original pavement.

† 2. Shaw and Dunlop, No. 416.

in the manner in which he contended ; and that, therefore, they had a right to remove some erections on this spot of ground, which contained a place of burial, to the removal of which Mr Ouchterlony was extremely averse, concluding, as it is natural to most men, that places of burial should not be improperly disturbed. But really, my Lords, the question at last came to this, whether Mr Ouchterlony had an exclusive right to this portion of land, to which he derived title under a conveyance from the Magistrates of Arbroath to an ancestor of Mr Ouchterlony, dated the 7th February 1771, and registered in the Books of Session 11th June 1816, which recites, that by an act of the Town-Council, dated the 8th of December last, they had agreed to grant a feu-right to John Ouchterlony of Guynd, now deceased, of 54 square ells of the ground of the Old Abbey Kirk. Then, by a positive clause, they sell, alienate, and dispoise from them and their successors in office, to and in favour of Ann Ouchterlony, her heirs and successors, the foresaid 54 square ells of ground as the same was then enclosed. Upon that disposition it appears that no infeftment ever took place ; and therefore, under that conveyance to him, he could not properly sustain his title to this property.

My Lords,—It appears to me, on a reperusal of this paper, and on a consideration of the Cases, that the Officers of State have a sufficient title to pursue in this case, and that Mr Ouchterlony is not entitled to prevent the removal of those erections by the Officers of State ; but that, on the other hand, the Officers of State are entitled to have it declared that this spot belonged to the Crown. It appears to me, upon the whole, that the interlocutors which have been pronounced in this case are right ; and, therefore, I shall humbly move your Lordships to affirm this judgment. At the same time, my Lords, I must confess it would be a great gratification to me, to find that the Officers of State have no intention of improperly doing that which would be disagreeable to this gentleman's feelings. It appears that the object which the Officers of State have in view is, (this being a venerable and curious ruin), to remove some of those obstructions which have, from the negligence and inattention of those who have had the superintendence of this property, been suffered to take place in the interior of this Abbey, but at the same time taking care not to do any thing unnecessarily which shall tend to injure Mr Ouchterlony or any other person. In affirming this judgment, therefore, I do not apprehend Mr Ouchterlony's feelings will be unnecessarily distressed. It appears to me, in looking through these papers, that the question has been treated as a question of title to this spot ; Mr Ouchterlony conceiving that he had a title to this spot under the grant I have stated to your Lordships from the Magistrates of Arbroath, who certainly had no right whatever to grant it, the property remaining in the Crown, or being, as they contend, transferred to Mr Maule of Panmure. Upon the whole it appears to me, that the Officers of State have made out a sufficient title to this spot, and that Mr Ouchterlony has failed in so doing ; and

June 21. 1825.

June 21. 1825. therefore I cannot help thinking, under all the circumstances of this case, your Lordships are bound to affirm the judgment of the Court of Session.

SPOTTISWOODE and ROBERTSON—MUNDELL,—Solicitors.

No. 45. JOHN GRAHAM, Writer to the Signet, Appellant.

KEEPER, DEPUTE-KEEPER, and COMMISSIONERS of the SOCIETY of Writers to the Signet, and the TREASURER and PROCURATOR-FISCAL of that SOCIETY, Respondents.

Title to pursues—Corporation—Writers to the Signet.—An action having been brought by the keeper and depute-keeper of the signet, and of the commissioners, treasurer, and procurator-fiscal of the corporation or society of clerks or writers to the signet, (but not setting forth that they pursued on behalf of the society), against a member of the body, to have it found that certain rules were legal and proper; that effect should be given to certain proceedings by them against that member for alleged infraction of the rules; and that they had power to suspend him from or deprive him of his office; and the Court of Session having sustained the title of the pursuers to sue, and decerned in terms of the libel;—the House of Lords reversed, and absolved the defender.

June 21. 1825.

1st DIVISION.
Lord Alloway.

ORIGINALLY the office of keeper of the signet was vested in the Secretary of State, but latterly the offices were in general kept separate. By the commission there is conferred on the keeper, ‘dictum locum munus et officium custodis dicti signeti cum omnibus feodis, proficiis, beneficiis, casualitatibus, libertatibus et immunitatibus, ad dictum locum et officium legitime spectantia pertinent.’ but nothing is said as to a power to incorporate.

The writers to the signet were clerks in the office of the Secretary of State, and were prohibited from engaging in the business of ‘procuratoris, agentis, nor ordinarie servandis to the Lordis of Session or men of law, or exerce ony othir particular office in hurt and prejudice of the rest of the brethrene and general office. Bot that the saidis writuris, and ilk ane of yame, sal be friemen, keep oppin buithis, speciallie await and attend upon yair buithis and vocation, and naways be subject to ony uther particulare service or servitude of ony persones, under the pane of deprivation.’ In the progress of time, however, they began to perform their business in their own private offices, and acquired the privilege of acting as agents before the Supreme Court, which had been previously confined to advocates’ clerks. They are admitted by virtue of a commission granted by the keeper, who, in more ancient times, was in the practice of limiting the number. As clerks to the signet, they have the exclusive

right of framing all writs passing under the signet, and drafts of all deeds to which the seals require to be appended. From the nature of their occupations they soon began to be extensively employed as conveyancers; and at the present day, the body of writers to the signet practise both in that capacity and as agents; but so far as regards their characters as agents and conveyancers, they possess no exclusive privileges. June 21. 1825.

The keeper appoints a deputy-keeper, and a certain number of the body as commissioners; and the commission which is granted to the latter proceeds on the narrative, that 'it belongs to me, as keeper of the said signet, to admit clerks to the signet, and to restrain and punish abuses, informalities, and disorders which may happen among clerks to the signet; for which end, it has been the constant custom and practice of the principal keepers of his Majesty's signet to grant commission to a certain number of the clerks to the signet. Therefore, pursuant to this laudable custom, I, as principal keeper foresaid, do, by these presents, give full power and commission to,' (then follows the commissioners' names), 'with the deputy-keeper, to be commissioners for the clerks to the signet, or to any five of them, the said deputy-keeper being always one, to convene as often as they shall think fit, and to take order with all abuses, falsities, and informalities, in their vocation already committed, or which shall happen to be committed by any member thereof, masters or servants, and to punish the same according to the acts made by former keepers and commissioners to the signet, for the good of the calling; which I do hereby ratify and confirm.' The duties thus conferred are exercised by the commissioners alone. No charter of incorporation had ever, as far as could be discovered, been granted to the writers; and although by-laws were frequently made, yet they derived their authority from the keeper, acting under the advice of the commissioners. Accordingly, at an early period various regulations were made by him, both in relation to their private and public conduct. Thus, in 1656, he ordained 'that no writers to the signet in time coming tak up publick tavernes, or open inne-houses for selling of meat and drink, an that thes who alreadie keep such tavernes and innes discharge themselfs betwixt and Mertemes next, under the payne of deprivatione.' Again, on another occasion, he declared, that all 'wryters to the signet tak care for the future that all wryts be correctlie written, without blotting, razeing, or vitiatione.' Among other regulations which were established, was one dated 22d January 1666, by which they were prohibited 'to acknow-

June 21. 1825.

' ledge or own any person or persons whatsoever as their servants
 ' or prentices, but such only as in very deed and truth, without
 ' all fraud or collusion, are their real and actual prentices and
 ' servants, actually residing and writing in their chambers, whose
 ' writings and employments, whether come in by themselves or
 ' their masters, redound wholly to the profit and benefit of their
 ' masters, except the usual drink money; and likewise discharge
 ' and prohibit all the said writers, and every one of them, to
 ' make any paction or bargain with any agents, clerks, ser-
 ' vants, notars, and others, dependers on the College of Justice,
 ' or any in their names, for writing of their employment, during
 ' any set time, for pensions, or at base and naughty prices, be-
 ' neath the ordinary price now in use, to the prejudice and
 ' contempt of the calling.' And with regard to all such as
 transgress or contravene any part of the premises, they ' shall
 ' pay for the first fault, to the treasurer of the calling, for the
 ' use of the poor thereof, the sum of L. 40 Scots; and for the se-
 ' cond fault, shall be deprived from their offices simpliciter. And
 ' for the more effectual and vigorous execution of this act, it is
 ' of consent of the whole body declared, that it shall be leisome
 ' to the procurator-fiscal, in all complaints to be founded upon
 ' the contravention or the breach of this act, to refer the samen to
 ' the delinquent's oath of verity, when he wants other probation;
 ' and that they being lawfully cited by the ordinary officer,
 ' personally apprehended, to compear before the commissioners
 ' to answer to the complaint, and failzieing to compear, or,
 ' compearing, refuse to depone or purge themselves by their
 ' oaths, which oath they of their consent hereby allow the com-
 ' missioners to administer, they shall be holden as confest, which
 ' shall be as sufficient as if the complaint were proved by
 ' write or witnesses; and ordain all the present writers present-
 ' ly to subscribe this act and testimony of their assent and
 ' submission thereto; and that all the entrant writers sub-
 ' scribe the samen at their admission, that it may have perpetual
 ' observance, as that which so much concerns the good and weal
 ' of the calling; and ordain that every writer have a copy of thir
 ' presents, under the clerk's hands, affixed publickly in their
 ' chambers, that they nor their servants may not pretend ig-
 ' norance thereof.' By the present printed acts and regula-
 tions, the following rules are established: 1. ' That no clerk to
 ' the signet shall own or acknowledge any person as his appren-
 ' tice or clerk, but such only as, in very deed and truth, without
 ' fraud or collusion, is his real actual apprentice or his clerk, and

‘actually attending and writing in his chamber.’ 2. ‘That June 21. 1825.
 ‘no clerk to the signet shall subscribe any bills, summonses, let-
 ‘ters, signatures, precepts, services before the macers, or other
 ‘writs peculiar to the clerks to the signet, but such as are drawn
 ‘or written by themselves, or their actual apprentices or clerks
 ‘by their directions, except when they sign for an absent brother,
 ‘as before directed, and except bills of advocation and suspen-
 ‘sion, and all ordinary summonses which do not pass upon bills.’
 3. ‘That every clerk to the signet shall take the full fees by law
 ‘established, and no less, for signing letters and other writs pe-
 ‘culiar to his office, except such signet letters as, being signed by
 ‘one of the ordinary writers for the poor, are to be gratis.’ 4.
 ‘That no clerk to the signet shall make any paction or bargain
 ‘with any person or persons whomsoever, directly or indirectly,
 ‘to subscribe any bills, letters, or other writs peculiar to the
 ‘clerks to the signet, for less prices than those by law established,
 ‘and shall not give back any part thereof, either by way of grati-
 ‘fication, or any other manner of way which may elude the true
 ‘intent and meaning of these regulations.’ 5. ‘That in case any
 ‘clerk to the signet shall transgress or contravene any of the pre-
 ‘ceding regulations in this chapter, he shall, for the first offence,
 ‘pay L. 5. sterling to the treasurer of the society, for the use of
 ‘the poor, and for every subsequent offence shall be suspended
 ‘from his office.’

In 1800, the appellant John Graham was, after an examina-
 tion, admitted a writer to the signet, by virtue of a commission
 granted by the late Lord Melville, keeper of the signet, and
 which proceeded on the narrative, that he had the ‘power and
 ‘right to admit writers to the signet;’ and therefore he nominat-
 ed and presented ‘the said John Graham to the said office of
 ‘writer to the signet.’ Accordingly, Graham paid the usual dues,
 subscribed the above regulations, took the oath de fideli, and
 thenceforth acted in this capacity. In the month of February
 1821 Mr Richard Mackenzie, procurator-fiscal for the society,
 presented a petition and complaint to the keeper and commis-
 sioners, in which, after founding on the above regulations, he set
 forth, ‘That John Graham, writer to the signet, has, within the
 ‘last four months, been guilty of contravening the foregoing regu-
 ‘lations; and in proof thereof the complainer now condescends
 ‘and, offers to prove the following facts:—1st, The said John
 ‘Graham owns or acknowledges eleven different persons as his
 ‘apprentices or clerks, while the fact is, that not one of them is
 ‘in very deed and truth, without fraud or collusion, his real

June 21. 1825. 'actual apprentice or clerk, and actually attending and writing
 ' in his chamber; or at least, several of the said apprentices or
 ' clerks, so owned or acknowledged by the said John Graham,
 ' are not in very deed and truth, without fraud or collusion, his
 ' real actual apprentices or clerks, and actually attending and
 ' writing in his chamber. 2d, The said John Graham has,
 ' within the last four months, subscribed a great number of sig-
 ' net letters, which were not drawn or written by himself, or his
 ' actual apprentices or clerks by his direction; and in particular,
 ' in the period between the 1st and 31st days of January last, both
 ' inclusive, the said John Graham subscribed 116 signet letters,
 ' the whole, or the greater part of which, were not drawn or writ-
 ' ten by himself, or his actual apprentices or clerks by his direction.
 ' 3d, The said John Graham has not taken or charged the full fees
 ' by law established for signing the signet letters above specified;
 ' or at least, he has not taken or charged the full fees by law es-
 ' tablished for signing the greater part of the said signet letters.
 ' 4th, The said John Graham, instead of taking or charging the
 ' full fees by law established for signing signet letters, has, within
 ' the last four months, been in the constant practice of subscribing
 ' signet letters for various persons, from whom he has received, or
 ' has conditioned to receive, a trifling consideration, far short of the
 ' full fees by law established for signing signet letters.' And the
 complainer prayed ' the honourable keeper and commissioners
 ' to grant warrant for serving this petition and complaint upon
 ' the said John Graham, and to ordain him to give in answers
 ' thereto within eight days after service; and thereafter, on ad-
 ' vising this petition and complaint, with or without answers, to
 ' fine and amerciate the said John Graham in the sum of five
 ' pounds sterling, and to ordain him to pay the same to the trea-
 ' surer of the society for the use of the poor, or to inflict such
 ' other punishment upon the said John Graham as shall appear
 ' to be proper in the circumstances of the case.'

The petition having been served upon Graham, he lodged answers, declining the jurisdiction of the keeper and commissioners to take cognizance of those charges; but upon advising the proceedings, the commissioners found the complaint relevant, and appointed Mr Mackenzie to state in a minute his mode of proof, and Graham to see and answer. A minute was accordingly lodged, in which a reference was made to Graham's oath, which was sustained, and he was appointed to appear and depone under certification. He declined to do so, both in respect of their want of jurisdiction, and of the illegality of the reference. The com-

June 21. 1625.

missioners, however, after hearing evidence as to the number of signet letters which had been presented by Graham within a limited period, and which were one-seventeenth of those of the whole society, pronounced this judgment: 'The commissioners having considered the petition and complaint, with the whole procedure thereon, and the said John Graham having not only failed to appear, but also intimated his intention not to appear, hold him as confessed on the matters alleged against him, and fine and amerciate him in the sum of L. 5 sterling; and ordain him to pay the same to the treasurer of the society, for the use of the poor, within fourteen days from the date of intimation to him of this deliverance; and further certify him, in case of repetition of similar acts in breach of the regulations of the society, they will proceed to suspend him from, or deprive him of his office of writer to the signet, according as the justice of the case may require.'

This was followed by an action, the summons of which against Graham proceeded in the names 'of the Right Honourable William Dundas, Lord Clerk Register of Scotland, and principal keeper of the Signet; Colin Mackenzie, deputy-keeper, Alexander Duncan, David Stewart, (and certain other persons, but not including all the members of the society), all clerks or writers to the signet, and commissioners for the society and corporation of clerks to the signet; Richard Hotchkiss, treasurer, and Richard Mackenzie, writer to the signet, procurator-fiscal to the said society.' The summons then set forth, 'that the society and corporation of clerks or writers to our signet are entitled to certain exclusive rights and privileges, and particularly to the exclusive right and privilege of signing all letters and writs which pass under our signet:' that the above regulations had been made: that a commission had been granted by the keeper to the deputy-keeper and commissioners, with power to make rules and regulations, to enforce the same, and do every thing competent for him to do: that they had exercised these powers on various occasions: that Graham had been admitted a member, and subscribed the regulations: that he had violated them, and the above proceedings had been adopted against him; and therefore they concluded, that it ought and should be found and declared, by decree of the Lords of our Council and Session, that the acts and regulations of the society and corporation of clerks or writers to our signet, specially founded on in the petition and complaint at the instance of the procurator-fiscal for the said society against the said John

June 21. 1825. 'Graham, and herein before recited, are legal and proper; and
 'that he, as a member of the said society and corporation, is
 'bound to give obedience thereto, and to all such other acts and
 'regulations of the said society as shall be legal and proper, and
 'found to be necessary for preserving to the said society the
 'rights and exclusive privileges pertaining to its members: and
 'it ought and should be found and declared, that the foresaid
 'petition and complaint, preferred by the procurator-fiscal for
 'the said society against the said John Graham, and the pro-
 'cedure thereon, and the judgments and sentence of the com-
 'missioners pronounced therein, are legal and proper in the cir-
 'cumstances of the case; and in terms of the sentence of the said
 'commissioners, the said John Graham, defender, ought and should
 'be decerned and ordained, by decree foresaid, to make payment
 'to the said Richard Hotchkis, treasurer of the said society, for
 'behoof of the poor, of the foresaid sum of L. 5 sterling, being
 'the amount of the fine awarded against the said John Graham
 'as aforesaid, with the legal interest thereof from the date of the
 'citation to follow hereon: And further, it ought and should be
 'found and declared, by decree foresaid, that in case the said
 'John Graham shall wilfully contemn the authority of the keeper
 'and commissioners, and continue to act in direct opposition to
 'the rules and regulations of the society and corporation of
 'writers to our signet before recited, the said keeper and com-
 'missioners are entitled, upon such charges being duly estab-
 'lished against him, to suspend him from or deprive him of his
 'office of writer to our signet, according as the justice of the case
 'may require.' In defence, Graham, after making a statement
 'of facts, pleaded,—' 1st, The pursuers have no title to maintain
 'the action. They have never been erected into an incorporation
 'by letters patent from the Crown or by statute. 2d, 'The pur-
 'suers have no judicial powers or authority. The attempt
 'which they have here made to exercise such powers, is a gross
 'and palpable usurpation of jurisdiction. The proceedings, such
 'as they were, have been totally informal. They were incompete-
 'tently brought, and have been most irregularly conducted. As
 'a specimen of this, the prosecutor is represented as having acted
 'as a judge. Such proceedings this Court cannot support. 3d,
 'The pursuers have made various attempts of a nature similar
 'to the present, but their efforts have uniformly been defeated.
 'Certain fees are allowed by law to be taken as a maximum for
 'their professional labour. They attempt to convert the maxi-
 'mum into a minimum, and to insist that no writer shall in any

‘ case make a lower charge against his clients than the highest sum which in any instance it is lawful to exact. This is plainly illegal. The pursuers have no right to inquire what are the charges which the defender makes against his employers, as long as it cannot be alleged that he has exceeded the fees authorized by law to be taken by the writers to the signet.’ June 21. 1825.

The case having come before Lord Alloway, his Lordship repelled the objection to the pursuers’ title in the action, and found them, in this respect, entitled to all the privileges of ‘ an incorporation;’ but ordained them to give inspection to Graham’s counsel and agent of their records. Graham having lodged a representation on the question of title, and the merits having been argued in memorials, his Lordship reported the whole cause on informations.

* *Lord Hermand.*—The argument of the defender just seems to rest on his dividing this corporation into separate parts; and his argument is, that these separate parts, as such, have no independent existence. He says, that they do not elect their own officers, they do not enact their own by-laws: that all this is not done by the society, but by the keeper, or by the commissioners, a separate body from the society, and acting under the express authority of the keeper. But this corporation is acknowledged. This action is raised in the name of the keeper, &c. Look to the title of the paper. It is the keeper and commissioners for the society of clerks or writers to the signet.

This question has already been decided in the case which occurred before with the solicitors, where it was found that they were a corporation, and entitled to the privileges of a corporation; and I should be very sorry, indeed, if there was any difficulty now in the case.

Lord Balgray.—I am very much of the same opinion. The argument respecting this society being a corporation, comes a great deal too late. It is impossible for us to get the better of the judgment in the former case. The authority of Bankton and Erskine are in point; and then, when you come to the former case, look what the interlocutor says, ‘ Find the keeper, commissioners, and clerks to the signet, though entitled to all the privileges of a corporation,’ &c. I say, when I consider the judgment of the Court in the former question, it is impossible for me to entertain any doubt on the main point now before us; more particularly when I see a case of a later date which carries

* These are the opinions which were laid before the House of Lords.

June 21. 1825. the same doctrine with it—I mean the case of the society of writers to the signet against Gardner in the year 1814, where it is assumed, that they were a corporate body, that they had a right to make by-laws, and to protect and enforce these by-laws. So I am afraid it is far too late for us to entertain any doubt of this body being entitled to all the privileges of a corporation. The thing is settled. One of these privileges is the power of making by-laws, which I can have no doubt this body has; and I do not know any regulation which is better for the protection of the lieges, or more for the benefit of the body itself, than this very regulation which has given rise to the present proceedings; and therefore I am quite clear, that we should repel the defences in this case.

Lord Gillies.—I confess there is one point upon which I entertain some little doubt in this case. I am quite clear on the point that has been spoken to. It is a great deal too late now to argue against this being a corporation. The argument against its being a corporation seems to arise only from the peculiarity of the constitution of this corporation,—that the body itself does not possess all the powers which some other corporations have, of electing their own officers, enacting their own by-laws, &c.—that this is done by the head of the corporation, or a certain portion appointed and nominated by the keeper: but these are merely peculiarities, and therefore on that point I have no doubt.

My only doubt is as to the conclusion in the summons, which declares that it shall be in their power to dismiss any of their members. But a member of the society of writers to the signet is a member of the College of Justice, a great corporation, composed of several smaller corporations. Now my difficulty is, whether it be competent for one of these lesser bodies to dismiss one of their number, so as to exclude him from being a member of the larger corporation. It is there the only doubt I have in the case lies.

Lord President.—I might have some difficulty on the last point stated by Lord Gillies, if the society were to proceed to dismiss one of their members without the aid or sanction of the keeper. But if the keeper has prescribed certain laws and regulations, one of which is the power to suspend or dismiss members, and should go along with the society in the exercise of that regulation, I would then have no difficulty. They stand somewhat in a different situation from the Faculty of Advocates, because it is not the Faculty that admit their members; it is the Court alone. The Court can also dismiss any of the members: They could dismiss a writer to the signet: I don't know if they could not dis-

Jan^y 21. 1823.

miss the keeper himself. But at all events, the Court, as the head of this corporation of the College of Justice, might remove all subordinate to themselves. But it does not follow that some of the corporations may not, in matters purely internal, and belonging to their own body, have power by their head, and in conjunction with him, to dismiss any of their members for disobedience of their internal regulations. Suppose he had refused to pay his contribution to the widows' fund: I believe it is one of the regulations, that if the contributions are not paid before a certain time, the member failing may be dismissed: whether that is really the case or not I don't know, and it don't matter; but suppose such a regulation was in existence, that such a law had been made and sanctioned by the keeper, and had been acted on for an hundred years, and subscribed by the member himself, that if he did not pay his arrears within a certain time, he should cease to be a member of the incorporation, would they not be entitled to enforce that regulation? And therefore, in all matters internal to themselves, they have the power of enforcing their regulations. But at all events this man cannot complain; he subscribed these rules, and of course was bound by them: and in this view it really does not matter whether they were a corporation or not. If they are not a corporation, they are at least a club; and any club can dismiss any of its members for not obeying its laws. The new club in St Andrew's Square could do this, and more particularly if its members at their admission subscribe the regulations. Therefore, whether this was a corporation or not, it will not make for the defender; and therefore, I confess, on this part of the case I have as little doubt as on any other.

With regard to holding him as confessed, why he has subscribed to that regulation too; and, even if he had not, I am quite clear that every thing that goes merely to a fine, or even dismissal from office, may be referred to a party's oath. This is the case, your Lordships know, with poachers, whose oath is held sufficient without farther evidence. This man has subscribed and agreed to the rules; these rules are sanctioned by the keeper; and therefore I think he is bound by them. It is said that the keeper may not be a writer to the signet: but what of that? The speaker of the House of Lords may not be a Peer; a commoner may be speaker in the House of Lords; but it will be the House of Lords for all that. On the whole, I see no reason for entertaining any doubt whatever on this case.

The Court accordingly, on the 13th February 1823, 'repelled' the defences stated for the defender, and decerned and declared

June 21. 1825. 'in terms of the conclusions of the libel against him, and found him liable in expenses.' *

Graham then appealed.

Appellant.—1. In considering the question of title, it is necessary to keep in view, that the action is brought by the respondents in their capacity of clerks or writers to the signet. As agents and conveyancers they do not possess any exclusive privileges; and it is not pretended that in either of these capacities they form a corporation. It is admitted, that they have no incorporating charter: but it is said, that they have enjoyed corporate privileges for time immemorial, and therefore the existence of a charter at one time in their favour must be presumed: that, accordingly, they have been in the practice of making by-laws, and have been recognized both by the Courts of law and by institutional writers as a corporation. There is, however, no foundation for such a plea. It may be true, that in relation to burghs royal, and corporations connected with them, a presumption in law arises, from the exercise of corporate privileges for a long period of time, that a charter or seal of cause at one time existed; because it is well known that burghs derived their privileges directly from the Crown, and that the minor corporations obtained a communication of privileges from the burgh. But no such presumption can exist with regard to such a body as the writers to the signet. Besides, they have never possessed any of the distinctive qualities of a corporation. As a body, they have no means of perpetuating their own existence; they are entirely dependent on the keeper. He may restrict their number at pleasure,—a power which was frequently exercised by him. He has even admitted persons, who had not served an apprenticeship, as writers to the signet. Neither is it true, that as a body they have the power of making by-laws. These derive their authority from the keeper alone; and although this is exercised through the intervention of commissioners, yet it is from him that these rules derive their authority. Neither have they any peculiar privileges as a body. It is true that the signet is only affixed to writs subscribed by each of them individually; but that is done in respect of their being the clerks of the keeper, and as such authorized to prepare the writs. Neither have they any peculiar privileges as members of the College of Justice. They are, no doubt, agents

June 21. 1825.

before the Courts; but so are advocates' clerks and solicitors; and here they do not pretend to any corporate rights as agents. If, therefore, they are not a corporation, they have no right to sue in the mode in which they have appeared in Court; and if, on the other hand, they be a corporation, they do not sue in their corporate capacity. It is true that, in a question with the solicitors, relative to another point, the Court introduced an obiter dictum into their interlocutor, that the writers were a corporation. But this cannot be regarded as a judgment in the present question; and the institutional writers do not say in explicit terms that they constitute a corporation.

2. The regulations attempted to be enforced are most illegal. It may be perfectly lawful to prohibit larger fees to be taken than certain specific sums; but it is most unjust towards the public to enact that nothing less may be taken.

3. The proceedings against the appellant were unlawful. He was called upon to make oath to the verity of certain charges relative to the breach of rules, which it was said he had sworn not to do,—a proceeding incompetent even in a Court of law, and still more so by a self-constituted body. They were also most irregular; because it appears from the record that the sentence was not properly signed, and that the prosecutor acted as one of the judges.

4. The conclusions of the summons, as to the power of suspension and deprivation, are incompetent. The appellant holds a commission for life as a writer to the signet, for which he paid the usual fees, and therefore gave an onerous consideration. Besides, the conclusion does not bear relation to what has been done, but as to what 'shall' be done; thus leaving it to the discretion of the respondents to fix the grounds on which the appellant may be deprived of his commission.

Respondents.—1. The respondents have a clear title to pursue the present action. The society of writers or clerks to the signet are a corporation. They are specially mentioned as such by the first legal authorities, and as constituting an inferior corporation included in the greater one of the College of Justice; and they have enjoyed all the rights and privileges of one for centuries past.—They have also been recognized as such by the decision of the Court of Session in the question with the solicitors, where their corporate powers and privileges were expressly sustained, and their nature and extent precisely defined. Admitting that the appellant was well founded in his views of the society,—that they are merely a number of individuals appointed by the keeper of the signet to execute a part of his duty, and deriving their

June 21. 1825. whole privileges from, and holding them in dependence on him; still, it is evident, that the keeper must have a right to insist that each member shall execute the duty committed to him according to the regulations which he has laid down and sanctioned, and which regulations constitute the condition of the appointment. He has, on such a supposition, an undoubted right, by himself or his delegates, the deputy-keeper and commissioners, to inquire into and to punish, to the extent of deprivation, all breaches of these regulations, and to have his powers in this respect declared by the Court. But he and the deputy-keeper and commissioners are pursuers of the action. There is, therefore, in every point of view, a sufficient and competent title in the pursuers to insist.

2. The particular regulations on which the complaint against the appellant was founded, have been from time immemorial the law of the society, and have been repeatedly approved of and sanctioned by the keeper, the commissioners, and the society at large. They were consented to and subscribed by the appellant himself at the time of his admission, and constituted the condition of his appointment. They are, in themselves, in no respect contrary to or inconsistent with justice or general law; and they are highly useful, nay, requisite and indispensable, to secure the exclusive privileges of the society from being clandestinely and illegally communicated to other practitioners, not members.

3. The proceedings before the commissioners, on the complaint against the appellant, were strictly regular and formal, being conducted in terms of the regulations, which constitute the law of the corporation, and the condition of his admission as a member. The reference made to his oath, for the purpose of proving the charge, is quite consistent with the general law of Scotland, which, in all civil questions, admits of this species of evidence. It is attended with no hardship or injustice in itself; and in the particular circumstances of the society it is the more necessary, that the offences to which it is applicable can scarcely, in any case, be substantiated by other evidence. The other objections stated by the appellant are too frivolous to deserve notice.

4. There is nothing incompetent or improper in the conclusion of the summons, as to the power of suspension and deprivation. It is one merely declaratory of the power, which leaves open to question, both the legality of any regulation which may be assigned as the ground of any future exercise of the power, and the justice of the application of that rule to the particular case itself. The power is clearly inherent in every corporation; and were it possible to

hold that the society is not entitled to the privileges of one, it must certainly be competent to the keeper of the signet, and to the commissioners, to whom he has expressly delegated it. June 21. 1825.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be reversed, and that the defender be 'assoilzied.'

LORD GIFFORD.—My Lords, There is another case to which I will call your Lordships' attention,—the case of Graham against the writers to the signet. My Lords, this was an action brought by the Right Honourable William Dundas, Lord Clerk Register of Scotland, and principal keeper of the signet; Colin Mackenzie, deputy-keeper of the signet; Alexander Duncan, David Stewart, and certain other persons, all clerks or writers to the signet, and commissioners for the society and corporation of clerks to the signet; Richard Hotchkis, treasurer; and Richard Mackenzie, writer to the signet, procurator-fiscal for the said society.

The summons states, 'that the society and corporation of clerks or writers to our signet are entitled to certain exclusive rights and privileges, and particularly to the exclusive right and privilege of signing all letters, or writs, which pass under our signet: That with a view of preserving those exclusive privileges, which, from their nature, might easily be infringed to a great extent by any one member of the society, it was found necessary by the society, at a very early period, to establish various rules and regulations to be observed by the members.' Then the summons states a minute of the society, passed so long ago as the 22d of January 1766:—it then sets out what are the present acts and regulations, some of them in force, regulating the conduct of clerks or writers to the signet; and one is, 'that no clerk to the signet shall own or acknowledge any person as his apprentice or clerk, but such only as in very deed and truth, without fraud and collusion, is his real actual apprentice or his clerk, and actually attending and writing in his chamber;'—and then, 'that no clerk to the signet shall subscribe any bills, summonses, letters, signatures, precepts, services before the macers, or other writs peculiar to the clerks to the signet, but such as are drawn or written by themselves, or their actual apprentices or clerks by their directions, except when they sign for an absent brother, as before directed, and except bills of advocacy and suspension, and all ordinary summonses, which do not pass upon bills; and that every clerk to the signet shall take the full fees by law established, and no less;'—and then, 'that in case any clerk to the signet shall transgress or contravene any of the preceding regulations in this chapter, he shall, for the first offence, pay L.5 sterling to the treasurer of the society, for the use of the poor, and for every subsequent offence shall be suspended from his office.'

The summons then states, that the principal keeper of the signet has granted a commission, according to the ancient custom, to a certain

June 21. 1825. number of the clerks to the signet, who are to regulate the proceedings of the society, and to punish all abuses, according to the acts made by former keepers or commissioners to the signet, with power also to make such new acts or statutes for the good of the calling as they should think necessary, and under the pains of deprivation, suspension, or pecuniary fines, according to the nature of the offence; and to make such acts and statutes as they shall find necessary in relation to the trial of clerks to the signet. The summons then goes on to state, that each member of the society, previous to his admission, subscribes the acts and regulations of the society, and takes an oath for his faithful conduct as clerk or writer to the signet. Then it states, that the appellant was admitted a member of the society on the 20th of May 1800, and subscribed the acts and regulations of the society, and also took the oath of fidelity. Then it states, that the appellant, since his admission into the society, had been guilty of infringing the acts and regulations to a great extent; and that the procurator-fiscal for the society had presented a petition and complaint against him to the keeper and commissioners: and then it goes on to allege, that, in consequence of this complaint, certain proceedings took place before those commissioners: and I should have stated to your Lordships, that one of the rules and regulations upon which they rely is, that, upon any complaint to be made upon the contravention of the articles, or any of them, they might be referred to the delinquent's oath of verity, when he wants other probation; and that they being lawfully cited by the ordinary officer personally to appear before the commissioners to answer the complaint, and failing to appear, or refusing to depone or purge themselves by their oaths, they shall be holden as confessed, which shall be as sufficient as if the complaint were proved by writing or witnesses.

It appears, my Lords, as I have stated, that this complaint came on before the Commissioners; that Mr Graham was required to take the oath to purge himself; that he declined to do so; that in consequence the commissioners, having considered the petition and complaint, with the whole procedure thereon, and the appellant having not only failed to appear, but also intimated his intention not to appear, held him as confessed on the matters alleged against him, and fined him in L. 5 sterling, and ordained him to pay the same to the treasurer of the society, to the use of the poor. Then, my Lords, they state, that he refused to pay the L. 5, and also contemned the authority of the keepers and commissioners; and maintained, that he was entitled to act in direct opposition to the rules and regulations of the society, and in defiance of the powers vested in the respondents to punish in such cases, by fine or otherwise, as the justice of each case might require; and these are the conclusions, ' that it ought and should be found and declared, by decree of the Lords of our Council and Session, that the ' acts and regulations of the society and corporation of clerks or writers ' to our signet, specially founded on in the petition and complaint at the ' instance of the procurator-fiscal for the society against the said John ' Graham, and herein before recited, are legal and proper, and that he,

June 21. 1825.

‘ as a member of the society and corporation, is bound to give obedience thereto, and to all such other acts and regulations of the society as shall be legal and proper, and found to be necessary for preserving to the society the rights and exclusive privileges pertaining to its members ; and that the foressaid petition and complaint, and the procedure thereon, and the judgments and sentence of the commissioners pronounced therein, are legal and proper in the circumstances of the case ; and that he should be decerned and ordained to make payment to the treasurer of the society of the said L. 5 awarded against him, with legal interest from the date of the citation. And further, in case he should wilfully contemn the authority of the keepers and commissioners, and continue to act in direct opposition to the rules and regulations of the society, that the keepers and commissioners are entitled, upon such charges being duly established against him, to suspend him from, or deprive him of his office of writer to the signet, according as the justice of the case might require ; and lastly, that he should be decerned and ordained to make payment to the respondents of their costs.’

My Lords,—In consequence of this summons, defences were lodged by Mr Graham, in which he contended, that the pursuers had no title to maintain the action ; that they had never been erected into an incorporation by letters patent from the Crown, or by statute ; that they had no judicial powers or authority ; that the attempt which they had made to exercise such powers was a gross and palpable usurpation of jurisdiction ; that the proceedings, such as they were, had been totally informal, being incompetently brought, and most irregularly conducted ; that they had made various attempts of a nature similar to the present, but that their efforts had been uniformly defeated ; and that, with respect to the fees, certain fees are allowed by law to be taken as a maximum for their professional labour ; but that the pursuers had no right to convert the maximum into a minimum, and to insist that no writer should make a lower charge than the highest sum which it was lawful for him to exact ; and that there was no offence in his taking less fees than were allowed by law.

My Lords,—When this case came on, an interlocutor was pronounced by the Lord Ordinary, on the 7th of December 1821, in the following terms :—‘ Having heard parties’ procurators upon the grounds of the libel and defences, appoints the parties to state the case in mutual memorials.’ Afterwards another interlocutor was pronounced, on the 12th of December 1821, in these terms :—‘ Having heard the counsel for the parties, appoints the pursuers to exhibit their books and records.’ Against these interlocutors the pursuers represented. They were anxious to have a finding engrossed in the interlocutor, that their title to pursue was sufficient ; and to this effect they begged the Lord Ordinary to find and declare accordingly. Upon advising that representation, with answers, the following judgment was pronounced on the 22d of December 1821 :—‘ The Lord Ordinary, having considered the representation, and the answers thereto, together,

June 21. 1682. ' with the whole process, repels the objection stated to the pursuers' title in this action, and finds them, in this respect, entitled to all the privileges of an incorporation : finds, that the defender's counsel and agent are entitled to inspection in the books or records of the pursuers, not only of all the minutes founded on by the pursuers, of which extracts are produced, and of all proceedings relative thereto, but also to inspection of these records as to all the particular acts and regulations of the society.' Your Lordships perceive, as far as the merits of the case were concerned, the Lord Ordinary repelled the objection stated to the pursuers' title, and found them, in this respect, entitled to all the privileges of a corporation.

My Lords,—The case was afterwards brought again before the Lord Ordinary, in June 1822, and then he pronounced this interlocutor :— ' Having considered the memorials for the parties, and the whole process, makes avizandum with the cause to the Court ; and appoints the parties to prepare, print, and box informations quam primum, that the same may be reported.'

The case came before the First Division of the Court of Session on the 13th of February 1823, when this judgment was pronounced :— ' The Lords having advised the mutual informations for the parties in this cause, they repel the defences stated for the defender, and discern and declare, in terms of the conclusions of the libel, against him.' So that your Lordships perceive, by this interlocutor, that the Court of Session did pronounce a judgment on all the conclusions of the libel against the defender.

My Lords,—One question in this cause, which has been agitated at your Lordships' Bar, was, Whether these clerks or writers to the signet were, or were not, a corporation ?—for your Lordships perceive the foundation on which the allegation of this summons sets out is, that this society and corporation of clerks or writers to the signet are entitled to certain exclusive rights and privileges, and particularly to the exclusive right and privilege of signing all letters or writs which pass under our signet.' Now, my Lords, that was one question in the Court below ; but then another question was raised,—Whether, assuming that they were a corporation, this action was properly brought, not in the name of the corporation, but in the name of Mr Dundas, who was the Lord Clerk Register of Scotland, and keeper of the signet, and some of the writers and clerks to the signet who had been appointed commissioners for the society and corporation of clerks or writers to the signet, and the other pursuers, namely, Mr Hotchkiss the treasurer, and Mr Mackenzie the procurator-fiscal ? So that your Lordships perceive this action is brought, not in the name of the whole body of writers to the signet, but is brought by Mr Dundas the keeper of the signet, Mr Colin Mackenzie the deputy-keeper, by some of the writers and clerks to the signet, by Mr Hotchkiss the treasurer, and by the procurator-fiscal, Mr Richard Mackenzie : and this is important in this view of the case, because your Lordships will see one of the conclusions of this libel is, ' that the acts and regulations of the society

and corporation of clerks or writers to our signet, specially founded on in the petition and complaint at the instance of the procurator-fiscal for the said society against the said John Graham, and herein before recited, are legal and proper.' June 21. 1825.

Your Lordships perceive, that the object of this action was twofold : first, to have it declared that all their acts and regulations under which they proceeded against Mr Graham were good, not only against him, but against all the other members of the body ; and afterwards what may be called the penal conclusion, to have the penalty of L. 5 paid to Mr Hotchkis, for behoof of the poor, according to the sentence which had been pronounced on the petition of complaint against Mr Graham. My Lords, if this body of writers to the signet are a corporation, I apprehend this action ought to have been brought by them as a corporation, to have their acts declared valid against any individual member. It was also necessary that it should be brought by them as a corporation, if they sought to enforce the payment of the L. 5. Now, my Lords, it is not brought by them as a corporation, but only brought by a certain portion of their body,—by the keeper, (supposing him a member of the corporation), and by the commissioners for the society and corporation of clerks ; and not brought by them, as we have seen it sometimes done in an action in the Courts of Scotland, on behalf of themselves, and all other members of the body, but it is brought by them individually, as keeper of the signet, and as commissioners and procurator-fiscal and treasurer.

My Lords,—It has been said, that not only is this body a corporation, but that that question has been set at rest by the decisions : that it was a body as long as history could go back, acting and making regulations for themselves, called by-laws, as a corporate body : that they have been recognised as a corporate body : that they have sued and been sued as a corporate body ; and that, therefore, it was now too late to question their being a corporation. And, my Lords, great reliance has been placed upon the passages which occur in one or two of the institutional writers, and particularly on one or two decisions which have taken place, in which this very respectable body of writers to the signet were parties. Now, my Lords, with respect to the institutional writers, Lord Bankton and Mr Erskine were cited ; but I cannot find in either of their works the proposition stated on the part of the respondents, that they are a corporation. My Lords, it is very true, that in a marginal note to the passage I will read to your Lordships it is said, that the writers or clerks to the signet are a branch of the College of Justice, and a corporation. As I had read it in the papers, I certainly did read it supposing Lord Bankton had expressly so laid it down in the text ; but when one comes to look to the text, to which this is the marginal note, he states no such thing. After stating how clerks to the signet are admitted,—and your Lordships know they are admitted by presentation from the secretary or lord-keeper of the signet, upon a trial of their sufficiency before certain of the com-

June 21. 1825. missioners appointed for that purpose,—then he states how they are sworn, and then he goes on in this way :—‘ Writers or clerks to the signet are a considerable branch of the College of Justice, and compose an honourable body under one of the Secretaries of State, or the Lord-Keeper of the Royal Signet for Scotland, when there is such distinct office, which is the case at present ; and they are properly clerks in the secretary’s office. The deputy-keeper of the signet, in the right of the secretary, or of the principal keeper, presides in all their meetings, and, together with the commissioners of the signet appointed by the secretary or principal keeper, is intrusted with the administration of the affairs of the society, the trial and punishment of delinquent members, the management of the common stock, and the examination and admission of intrants. The clerks to the signet long since have not had any concern in officiating as clerks of Session, who have been long under the foresaid regulation ; but they still write the above bills, which are presented to the Ordinary by the clerk to the bills. Besides their peculiar province in relation to signatures and expediting letters under the King’s signet, exclusive of all others, they practise in writing securities and conveyances, which is a considerable part of their business ; but others, likewise skilful in those matters, do it ; for there are a great many other writers who profess that employment, though they are not writers to the signet ; and those also conduct processes or actions before the Court of Session, and without them law affairs could not be carried on to any purpose. The clerks to the signet were of ancient standing ; for they are mentioned as an established society at the institution of the College of Justice, and reference is made to their fees as settled in James the Fourth’s reign.’ Now, my Lords, with respect to their being referred to as a corporation, Lord Bankton refers to the statute of 1597, cap. 59. My Lords, that statute does not appear to me to bear out that they are mentioned as a corporation : ‘ *Item*, That all clerks to the signet be sworn to exercise their offices lawfully and diligently ; that none of them reveal nor make manifest to any man what they write or does for another, but shall keep all close and secret,’ and so on. This is confirmed by two or three other statutes, cap. 60. and one or two others, in neither of which can it be contended that they are mentioned as a corporation ; on the contrary, they are mentioned as persons whose individual conduct is to be regulated by statute.

I would refer your Lordships to the manner in which Mr Erskine, in his Institutes, treated this particular body. He says, in treating of corporations, (and this is the passage which has been cited), ‘ A corporation, styled by the Romans, Collegium or Universitas, is composed of a number of men, united or erected by proper authority into a body politic, to endure in continual succession, with certain rights and capacities of purchasing, suing,’ &c. Then he goes on—‘ Cities, boroughs, hospitals, &c. may be thus incorporated ; and we have frequent instances of lesser corporations within greater : thus, in

‘most of the cities and boroughs of the kingdom, we see wrights, weavers, merchants, &c. incorporated, with certain rights and franchises granted to each of them; and of the same sort, may be reckoned the College of Justice, which includes several lesser corporations under it.’ And they argue, that though the writers to the signet are not mentioned as lesser corporations, they must be considered as included under that term.

But then they say, they are still more fortified by recent decisions; and particularly a case before your Lordships’ House, of the Society of Clerks to the Signet, and the Solicitors of the Supreme Courts of Scotland, in which the judgment was affirmed by your Lordships in the year 1803. Now, I beg to call your Lordships’ attention to that case. Your Lordships will find they are sued in a corporate name, and sued there as ‘the keeper, commissioners, and whole society of clerks to the signet;’ that was the way in which they sued there. The question in that case was, Whether those writers to the signet, or clerks, as they there called themselves, to the signet, were entitled to increase their legal fees; and the finding of the Court of Session is certainly singular. The interlocutor begins with this finding: ‘Find the respondents, keeper, commissioners, and clerks to the signet, though entitled to all the privileges of a corporation, have no power, by their own authority, to increase their legal or established fees; and therefore prohibit and discharge,’ and so on. Then that interlocutor was afterwards amended by another: ‘Having advised the mutual petitions for the keepers, commissioners, and clerks to the signet, and the society of solicitors of the Courts of Session and Commission of Teinds, and High Court of Justiciary in Scotland, with the answers to these petitions, find’ so and so. The decision there was adverse to the writers to the signet; they brought these interlocutors by appeal before the House of Lords, and those interlocutors pronounced against them below were affirmed: but I do not see that the question there was ever raised whether they were a corporation; all that the interlocutor there found was—to be sure it is a singular finding—not that they were a corporation, but that they were entitled to all the privileges of a corporation; and that is referred to by the Lord Ordinary in the interlocutor to which I have called your Lordships’ attention. He found them entitled to all the privileges of a corporation, but without saying they were a corporation. Why, my Lords, they have sued since in their own capacity, but by a very different title from that which they do in the case to which I have referred your Lordships.

The next case occurred in the year 1814, when they failed again; and there was no question there as to their being a corporation; and there they sued in this title, ‘The keeper, deputy-keeper, and society of writers to his Majesty’s signet.’ Now, if they are a corporation, it is a little singular they should have varied so in the manner in which they sued; for it appears to me, from the research I have been able to make, and what has been stated at your Lordships’ Bar, that the law in

June 21. 1823. this country is pretty much the same as in Scotland. They admit, that a corporation cannot exist except by prescription, by long-continued usage, or by charter or Act of Parliament. In this case they admit there is no charter of incorporation; but they say, that the long-continued usage they have enjoyed in making these by-laws, and other acts which they have done, they could not have done but by a corporate character; that that is sufficient evidence to establish before your Lordships that they are an incorporation. They say it is no objection to that, that the keeper of his Majesty's signet is a person appointed by the Crown, and that he also appoints a select body, (as it was argued by Mr Warren, the commissioners were a select body of this incorporation of writers to the signet), and that it was not uncommon for the select body to have a meeting, and prepare the by-laws by which the whole were to be bound. But my difficulty has been, looking at these proceedings, to understand how, whichever view I take of them, this ever can be supported. If they are a corporation, they ought to have sued in this case in their corporate character,—more particularly as they sought to have it declared, that the by-laws enacted by a particular portion of their body were to be binding on all their body,—more particularly, with respect to that declaratory conclusion, they ought to have sued in their corporate capacity, because it was in their character of clerks to the signet that they wished to have it declared that the by-laws were binding.

In the next place, as to this penalty of L.5, the commissioners were not particularly entitled to it; the keeper of the signet was not entitled to it; Mr Hotchkis was not particularly entitled to it, for it was to be paid to him for the benefit of the poor; the procurator-fiscal was not entitled to it. It was argued, and probably rightly, that he was added that your Lordships might pronounce some judgment, but that still the other members might have the benefit of the interlocutor which has been pronounced.

But, my Lords, it does appear to me, they are either a corporation, or they are not. If they are a corporation, they have not sued in their corporate character, and therefore those individuals, who are only a portion of the members of that body, have no right to come into Court to have it declared, that the acts and regulations made for the benefit of the whole body are to be binding upon the whole body, but the corporation itself ought to do so. With respect to the fine of L.5, the corporation ought to sue for it. The corporation is not itself entitled to the fine, because it was to be paid to the poor, but it is the corporation who must recover it at the hands of the party guilty of the charge imputed to him. Therefore I must confess, though I feel great hesitation when opposed to the very able persons who have expressed a different opinion—but when I appear at your Lordships' table, I am bound to give to your Lordships the best advice I can—I feel, I say, a great hesitation in asking your Lordships to undo that which has been done by the Court below; but it does not appear to me that the

June 21. 1825.

question discussed at your Lordships' Bar was properly brought forward,—whether, supposing this to be a corporation, the suit has been rightly instituted? The Court seems to say, whatever might be their opinion, yet they think the decisions to which I have called your Lordships, particularly the decision of 1799, in which it was determined they were entitled to the privileges of a corporation, bind the Court. But, my Lords, if that has established that they are a corporation, it is as keeper, commissioner, and whole society of clerks to the signet. It has never been determined that, if they are a corporation, they can sue as keeper, commissioners, treasurer, and procurator-fiscal; for they do not sue in their corporate character, as constituting the whole corporation, but merely as individual members of the body.

My Lords,—I have thought it right to intimate to your Lordships what opinion I have formed. If I were called upon to determine the question, whether they are a corporation or not, without materials upon which it could be more clearly shewn whether they were a corporation, it would be improper to propose a decision upon that; but it appears to me, that, even if they are a corporation, they are wrong in their mode of proceeding.

There is another question, Whether, supposing them a corporation, supposing they have the power of making by-laws, they can sustain the by-law they have made in this case, in which they enacted, that the party accused of an offence should be bound to purge himself upon his oath of verity, and that, if he refused so to do, he was to be holden confessed, calling upon the party charged with a probable neglect of duty to purge himself, or to confess his offence? It might be a very serious question upon that by-law, whether or not it was a legal by-law; because they have no right to make any by-law binding upon their members, not consistent with the general law of the country. Another question was, Whether the by-law was not illegal in enacting, that the party should not take less than certain prescribed fees by Act of Parliament of 50th Geo. III. which passed in the Parliament of this country? It was enacted by the by-law, that certain fees should be taken by the writers to the signet, and no less; but, my Lords, considering this an action brought by these individuals, not as representing the whole corporation, because they do not affect to do so in their summons,—not suing for the whole corporation, which, as I have said, is sometimes the case in the Courts of Scotland, that the party has sometimes sued for himself and all the others,—it appears to me impossible that these interlocutors can be supported upon this summons. If they are a corporation, they should have sued qua corporation: they have not done so, and therefore, whether a corporation or not, it appears to me these interlocutors cannot be supported.

I should notice another argument which was raised, that, if they are not a corporation, Mr Graham, who signed these, had personally bound himself to these articles; and therefore they might, though not a corporation, enforce against him the performance of the contract which

June 21. 1825.

this country is pretty much the same as in Scotland; a corporation cannot exist except by prescription, usage, or by charter or Act of Parliament. there is no charter of incorporation; but the continued usage they have enjoyed in making the acts which they have done, they could not have a rate character; that that is sufficient evidence. Lordships that they are an incorporated body to that, that the keeper of his Majesty's Signet by the Crown, and that he also is represented by Mr Warren, the common law incorporation of writers to the Signet for the select body to have.

which the whole were to be incorporated in at these proceedings; of them, this ever came ought to have been particularly as the body,—more

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SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

Signet. But owners had no e; the treasurers to me, that was in this suit stated to state to reversal of these whether the writers to these interlocutors

...; Masons of Lanark, June 11. 1730, (14,555.); P. F. of Aberdeen, Feb. 15. 33.; 1. Ersk. 7. 64.; 1. Hist. of Charles V. Skirving, Jan. 19. 1803, (19,021.); Maidland, 291.; Jamieson, voce Guild; 1. Craig, 1663.; 1. Bank. 248.; Blackstone, 474.—(3.) Hogg, Dec. 1681, (13,106.); Duff; 1. Ersk. 7. 64.; 2. Kidd, 112.; Tomlin, voce By-laws.

Authorities.—(1.) 1. Bank. p. 49.; 2. Bank. 495.; 1. Ersk. 7. 64.; Kelso, Jan. 8. 1755, (1380.); Tailors of Perth, Dec. 10. 1756, (1974.); Paisley, Feb. 17. 1761, (1956.); Lawson, Aug. 5. 1768, (1965.); Tailors of Perth, Jan. 26. 1776, (7709.); Solicitors against Writers to the Signet, Dec. 1800, (No. 1. App. Coll. of Jus.); Writers to the Signet, June 21. 1825 (P. C.)

YOUNG, ROSS, RICHARDSON and Co. Appellants.

JOHN RAMSAY, Respondent.

Acquiescence.—A landlord having let a mill described as a paper mill; and it having been made use of, with his knowledge, for six years as an oil mill; and thereafter the tenant having assigned the lease to another party, who employed it as a flour mill;—Held, (affirming the judgment of the Court of Session), That the landlord was barred from insisting that it should not be used as a flour mill, but should be reconverted into a paper mill.

June 21. 1825.
1st Division.
Lord Meadowbank.

MORRISON and Lindsay, papermakers, in 1792 acquired, by missive from the Duke of Athole, a lease for 58 years of the paper mill of Ruthven, and entered into possession. Afterwards, Young, Ross, Richardson and Company, having purchased the barony, land, and mill of Ruthven, executed in 1813 a regular lease in reference to the missive in favour of the son of Lindsay, (Morrison and Lindsay having died), of 'all and whole the paper mill of 'Ruthven, with the waterfall and other appendages belonging 'thereto,' declaring that he and his successors were to be thirled

June 21, 1825.

in return to the estate.

the property bought for the estate, it is to be used for the estate, and not for the estate.

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men, (the property of Young, Ross, Richardson and Co.) saying multures conform to use and wont corn they shall grind;' and binding houses, and machinery upon the erection he or they may make lease, in a sufficient work- at the issue of the tack.' people of the name of Young, Ross, Richardson and to an oil mill, and possessed it Stewarts then assigned their lease to in Perth, who took possession, (having with the tenant to remove the machinery extracting the oil, leaving only the water-wheel es), and at a heavy expense introduced machinery a flour mill. From the neighbourhood of Young, Richardson and Company's works, and other circumstances, they must have been aware of these operations; but they stated that they were not so,—that no communication had been made to them by Ramsay, and that they had not accepted rent, lest that might be construed into acquiescence. Ramsay, after having carried on the grinding of flour for about a twelvemonth, was called in an action by Young, Ross, Richardson and Company, concluding to have it found and declared, that he was only entitled to use the mill and appurtenances as a paper mill, and in no other way whatsoever; and to have him ordained to remove the machinery and other apparatus of a flour mill, and replace the machinery suited for making paper, and keep the premises in good and sufficient tenantable and workable condition, as a going paper mill; failing which, that he should be found liable in damages. The Lord Ordinary found, 'that the alleged acts of acquiescence and homologation are not sufficient to exclude the pursuers from insisting in the present process,' and decreed in terms of the conclusion of the libel. But the Court (11th March 1824) altered, sustained the defences, and found expenses due.*

Young, Ross, Richardson and Company, appealed.

Appellants.—1. The mill was let as a paper mill. The respondent had no right to convert it to any other purpose; and the

* 2. Shaw and Dunlop, No. 735.

June 21. 1825. he had himself entered into when admitted a writer to the signet. But then they ought to have sued as a body. The commissioners had no right to sue; the keeper of the signet had no right to sue; the treasurer had no right to sue, nor the procurator-fiscal. It appears to me, that they are not in a situation to support these interlocutors in this suit. Upon the whole, therefore, for the reasons I have ventured to state to your Lordships, I must propose to your Lordships a reversal of these interlocutors, because it appears to me, that whether the writers to the signet are a corporation, or not a corporation, these interlocutors cannot be sustained.

Appellants' Authorities.—(1.) 1. Blackstone, 487.; Masons of Lanark, June 11. 1730, (14,554.); Crawford, June 13. 1761, (14,555.); P. F. of Aberdeen, Feb. 15. 1762, (19,061.); 1. Ersk. 2. 49.; 1. Ersk. 7. 64.; 1. Hist. of Charles V. 38.; Miller, 381.; 3. Hallam, 33.; 1. Hallam, 303.; 2. Turner's Hist. 102.; Madox, 26.; 1. Kidd, 44.; Skirving, Jan. 19. 1803, (19,021.); Maitland, 291.; Skene, voce Guild; Dr Jamieson, voce Guild; 1. Craig, 1663.; 1. Bank. 249.; 1. Ersk. 7. 64.; 1. Blackstone, 474.—(2.) Hogg, Dec. 1681, (13,106.); Duff, Feb. 1799, (9576.); 1. Ersk. 7. 64.; 2. Kidd, 112.; Tomlin, voce By-laws.

Respondents' Authorities.—(1.) 1. Bank. p. 49.; 2. Bank. 495.; 1. Ersk. 7. 64.; Feuurs of Kelso, Jan. 8. 1755, (1380.); Tailors of Perth, Dec. 10. 1756, (1974.); P. F. of Paisley, Feb. 17. 1761, (1956.); Lawson, Aug. 5. 1768, (1965.); Tailors of Potterow, Jan. 26. 1776, (7709.); Solicitors against Writers to the Signet, Feb. 25. 1800, (No. 1. App. Coll. of Jus.); Writers to the Signet, June 21. 1814, (F. C.)

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

No. 46.

YOUNG, ROSS, RICHARDSON and Co. Appellants.

JOHN RAMSAY, Respondent.

Acquiescence.—A landlord having let a mill described as a paper mill; and it having been made use of, with his knowledge, for six years as an oil mill; and thereafter the tenant having assigned the lease to another party, who employed it as a flour mill;—Held, (affirming the judgment of the Court of Session), That the landlord was barred from insisting that it should not be used as a flour mill, but should be reconverted into a paper mill.

June 21. 1825.

1st DIVISION.
Lord Meadowbank.

MORRISON and Lindsay, papermakers, in 1792 acquired, by missive from the Duke of Athole, a lease for 58 years of the paper mill of Ruthven, and entered into possession. Afterwards, Young, Ross, Richardson and Company, having purchased the barony, land, and mill of Ruthven, executed in 1813 a regular lease in reference to the missive in favour of the son of Lindsay, (Morrison and Lindsay having died), of 'all and whole the paper mill of 'Ruthven, with the waterfall and other appendages belonging 'thereto,' declaring that he and his successors were to be thirled

June 21, 1825.

to the mill of Ruthven, (the property of Young, Ross, Richardson and Company), 'paying multures conform to use and wont 'for whatever quantity of corn they shall grind;' and binding them 'to uphold the mill, houses, and machinery upon the 'lands let, and also any new erection he or they may make 'thereon during the currency of this lease, in a sufficient work- 'able condition, and to leave the same so at the issue of the tack.'

Lindsay, in 1814, assigned the tack to people of the name of Stewart, who, in the knowledge of Young, Ross, Richardson and Company, converted the mill into an oil mill, and possessed it as such until 1819. The Stewarts then assigned their lease to Ramsay, a corn-merchant in Perth, who took possession, (having stipulated previously with the tenant to remove the machinery calculated for extracting the oil, leaving only the water-wheel on the premises), and at a heavy expense introduced machinery adapted to a flour mill. From the neighbourhood of Young, Ross, Richardson and Company's works, and other circumstances, they must have been aware of these operations; but they stated that they were not so,—that no communication had been made to them by Ramsay, and that they had not accepted rent, lest that might be construed into acquiescence. Ramsay, after having carried on the grinding of flour for about a twelvemonth, was called in an action by Young, Ross, Richardson and Company, concluding to have it found and declared, that he was only entitled to use the mill and appurtenances as a paper mill, and in no other way whatsoever; and to have him ordained to remove the machinery and other apparatus of a flour mill, and replace the machinery suited for making paper, and keep the premises in good and sufficient tenantable and workable condition, as a going paper mill; failing which, that he should be found liable in damages. The Lord Ordinary found, 'that the alleged acts 'of acquiescence and homologation are not sufficient to exclude 'the pursuers from insisting in the present process,' and decreed in terms of the conclusion of the libel. But the Court (11th March 1824) altered, sustained the defences, and found expenses due.*

Young, Ross, Richardson and Company, appealed.

Appellants.—1. The mill was let as a paper mill. The respondent had no right to convert it to any other purpose; and the

* 2. Shaw and Dunlop, No. 735.

June 21. 1825. appellants had a substantial interest to have the terms of the lease strictly obeyed. Although the Stewarts might have been permitted to convert the mill into an oil mill, that gave the respondent no similar right; and, at all events, never could be held to tolerate the change from an oil to a flour mill. 2. The Court ought to have ordered the flour machinery of the respondent's mill to be removed, for, by the terms of the lease, he is bound to frequent the corn mill of Ruthven, belonging to the appellants, with all his grindable corn; and as wheat was a perfectly well known crop at the date of the lease in question, the privilege must be held to comprehend wheat as well as oats. 3. The appellants never acquiesced in the respondent's alterations.

Respondent.—1. The original lease contains no clause obliging the tenant to use it as a paper mill. It is called a paper mill merely distinctivé. Provided he fulfilled at the end of the lease the obligation as to the machinery, the lessor had no title or interest to interfere. 2. The respondent's flour mill does not, and cannot interfere in any respect with the appellants' right of thirlage; the Barony mill has not the monopoly of grinding wheat. 3. The appellants unequivocally acquiesced in the alteration. They had seen the mill for years applied to oil making; and they saw, and did not disturb the respondent introducing flour machinery, and deliberately, and at a very heavy expense, converting the mill to its present purpose.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed.'

LORD GIFFORD.—My Lords, There is a short case which was heard before your Lordships a few days ago, in which Messrs Young, Ross and Company, are the appellants, and John Ramsay is the respondent. My Lords, the question in this cause is, whether Messrs Young, Ross and Company, who have purchased the property out of which this question arises from the Duke of Athole, have a right to compel Mr Ramsay to use a mill, of which he has purchased the remainder of the lease, in a particular way.

My Lords,—I will state very shortly to your Lordships the particulars of this case. This mill, which belonged originally to the Duke of Athole, was let under an agreement for a lease by the Duke of Athole, in the year 1792, to persons of the name of Lindsay and Morrison, who were paper-makers in Perth. On the death of Lindsay and Morrison, the right to the lease of this mill devolved on Henry Lindsay, the son of one of the leasees, who entered into possession. My Lords, in the year 1813, the appellants, Messrs Young and Company, having obtained by purchase from the Duke of Athole the right to this mill, together with other property, Mr Lindsay applied to them for a lease, and in

June 21. 1825.

November 1813 they executed a deed, whereby they set to him, for fifty-eight years from Martinmas 1792, 'all and hail the paper mill of Ruthven, with the waterfall, and other appendages belonging thereto, together with a park or field lying south thereof, and the houses and yards thereunto belonging; declaring, that the use of the water to the mill above mentioned, and the corn mill of Ruthven, shall be regulated as heretofore, that is, each having one-half; and in times of drought, when the water became insufficient to answer both mills, that each mill shall have the use of the whole water twenty-four hours at a time alternately.' There was an engagement in that tack, by which Mr Lindsay obliged himself to uphold the mill, houses, and machinery upon the lands let, and also any new erections he or they may have thereon, during the currency of the lease, in a sufficient workable condition, and to leave the same so at the end of the tack.

It appears that, after this lease or tack had been so granted, Mr Lindsay assigned it to a gentleman of the name of Stewart, and his two sons, and they possessed under this tack from the year 1814 to the month of March 1819: and, my Lords, it is important to observe, that when these gentlemen got into possession of this mill, it is, I think, clearly proved, that, with the knowledge and acquiescence of Mr Young, they converted it from a paper mill to an oil mill; and as an oil mill it was occupied by these gentlemen for several years, during which they held it. It appears, that in the year 1819 they were anxious to get rid of this mill, and they assigned their interest in it to the present respondent, Mr Ramsay, who, it appears, was a corn merchant, and who, soon after his entry, converted this oil mill into a corn mill and flour mill.

My Lords,—Soon after this, it appears that some disputes arose between the respondent Ramsay and the appellants, with respect to some things which had been done by the appellants on the water course through which the water flowed to the respondent's mill. An action was brought for the removal of these obstructions, and he succeeded in that action. An action was then brought by them against Mr Ramsay, by which, as I have stated to your Lordships, they sought to have it declared, that he should be decerned and ordained immediately to remove the machinery from the mill of Ruthven, and other apparatus of a flour mill introduced into the same, and to replace into the mill the machinery and other apparatus of a paper mill, so improperly and unwarrantably removed by him and his authors therefrom, and to keep and maintain the same in good and sufficient tenantable and workable condition as a going paper mill in all time thereafter during the remainder of the term. My Lords, they say, that under this tack, this being described as a paper mill, and the undertaking in the tack by the tenant being throughout to uphold the mill, houses, and machinery in this, which had been previously described as a paper mill, and also any new erections which he or they might make thereon during the currency of the lease, in a sufficient workable condition, and to

June 21. 1825. leave the same so at the issue of the tack,—they say that is an obligation upon him to keep it as a paper mill, and to leave it so.

Now, my Lords, supposing that to be the understanding on the part of the tenant, it is equally clear that it may be dispensed with on the part of the landlord. Now, in the year 1814, it is quite clear that they consented with Messrs Stewarts that it should not be used as a paper mill, but as an oil mill; and as an oil mill it was used for five or six years, up to the period of Mr Ramsay's entering upon the mill. My Lords, they now say, (and to which I beg leave to call your Lordships' attention), not, you shall use it as a paper mill, or use it as an oil mill, but you shall use it exclusively and solely as a paper mill during the remainder of the term. Now, my Lords, have they right to say that, after what has taken place between them and the Stewarts? They have, I say, by their own conduct, dispensed with that obligation, by permitting the mill to be used as an oil mill. But then they say, supposing that to be so done, you have no right to use it as a corn mill, not only on account of the obligation referred to, but on account of another obligation, not at all founded upon in the summons,—namely, an obligation on the part of Mr Ramsay, that he and his forefathers are hereby declared to be thirled to the mill of Ruthven, paying muktars conform to the use and wont of whatever quantity of corns they shall grind. They say, therefore, that, under this lease, it was clear it was never intended this paper mill should be used as a corn mill. My Lords, as I have stated to your Lordships, this was no part of the tack under which they proceeded in their summons. In their summons they proceeded solely on the ground I have stated to your Lordships of a grant as a paper mill, and that therefore they say it shall be used as a paper mill.

I should have stated to your Lordships, that, independently of the circumstances I have stated, Mr Ramsay founded on supposed acts of homologation and acquiescence on the part of the appellants; and the Lord Ordinary was of opinion, that the acts of acquiescence and homologation were not sufficient to exclude the pursuers from insisting in the present process; and therefore he found, decerned, and declared in terms of the conclusion of the libel. The result of this finding was a favourable one to the appellants; but on the case coming on before the Court of Session, they altered this interlocutor of the Lord Ordinary reclaimed against, sustained the defences, and assoilized the petitioner from the conclusions of the libel, and decerned.

My Lords,—It appears to me, upon the whole, that the decision of the Court of Session is right; because I think, that after the acquiescence and permission (because such it clearly was) to Messrs Stewarts to convert the paper mill into an oil mill, it was not competent to Messrs Young and Ross to say, that it should not be used as a corn mill; that they cannot say it shall be used as a paper mill,—and the whole gist of the action they have brought consists in this, that it shall be used as a paper mill. It is true they talk of removing the machinery

June 21. 1825.

of the corn mill, but then it is only with a view to replacing it as a paper mill. They do not say, you shall use it as an oil mill, or a paper mill, but they say, you shall replace it as a paper mill, though you have not yourself converted that paper mill into an oil mill; and though, with our acquiescence, Messrs Stewarts used it as an oil mill, you shall use it exclusively as a paper mill during the remainder of the term. My Lords, I apprehend they have themselves discharged that part of the obligation, as far as the converting it into 'an oil mill could have any effect; and therefore they cannot now say it shall be used as a paper mill exclusively during the remainder of the term.

My Lords,—I have thought it right to say so much on the case; for I wish to explain the views I have taken of the case, why I think your Lordships must affirm this interlocutor; because that interlocutor assizes Mr Ramsay from the conclusions of this summons, which summons is brought for the purpose of compelling the use of this as a paper mill, for which I think there is no ground.

Appellants' Authorities.—Ford, May 20. 1808, (No. 17. App. Tack); Magistrates of Glasgow, Feb. 11. 1813, (F. C.)

Respondents' Authorities.—Aytoun, May 12. 1801, (F. C.); Kinnoul, Jan. 18. 1814, (F. C.)

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

WILLIAM JEFFREY, Trustee on JAMIESON'S Estate, Appellant.

No. 47.

JOHN URE and JOHN MILLER, Respondents.

Bankrupt—Sequestration.—A trustee on a sequestrated estate under the 33. Geo. III. c. 74. having in a scheme of division inserted a claim, but allotted no dividend; and having marked that the claimant 'held goods;' and no complaint having in due time been made by the claimant; and the trustee having paid away all the funds;—Held, (reversing the judgment of the Court of Session), That the trustee was not liable for the dividends.

In April and May 1809, William Jamieson, manufacturer in Glasgow, consigned to a branch in Jamaica of the house of Ure and Miller of Glasgow, two parcels of goods invoiced at L.918. 5s. 6d. On the credit of these consignments Ure and Miller advanced to him L.615. 5s. 6d. Thereafter Jamieson drew a bill in their favour upon William Tate and Company for L.239. 19s. 10d., which Tate and Company refused to accept, and Ure and Miller were obliged to retire it.

On the 19th March 1810 the estates of Jamieson were sequestrated under the then Bankrupt Act, 33. Geo. III. c. 74.; and

June 21. 1825.

2D DIVISION.

June 21. 1825. on the 26th of that month Ure and Miller lodged a claim for L. 856. 5s. 4d. On the 17th April the appellant, Mr Jeffrey, was elected trustee, and on examining the claim of Ure and Miller, he conceived that there was room for a distinction,—that so far as regarded the bill for L. 239. 19s. 10d. they were entitled to be ranked, and to draw a dividend; but that they were not so as to the advance of L. 615. 5s. 6d., in security of which they held the goods. They then withdrew their claim in the above form, and on the 19th January 1811 lodged two separate claims, one for the bill debt of L. 239. 19s. 10d. and the other for L. 615. 5s. 6d. The original claim had been entered in the sederunt book in this form:—

By whom lodged.	When lodged.	Amount.	No.	Remarks.
19. Ure and Miller.	1810, Mar. 26.	L. 855 - 5 4	19	Consignment to Jamaica. <i>Withdrawn.</i>

In February thereafter Jeffrey proceeded to prepare a scheme of division, in which he inserted the two new claims in this form:—

Date of lodging claim.	No. of claim.		Amount claimed.	Amount continued.	Interest due on claims before 19th Mar. 1810.	Discount on claims due after 19th Mar. 1810.	Net amount of claims ranked.	Amount of dividend at 4s. per pound.
1811. Jan. 19.	88	Ure & Miller	239 19 10	234 3 5			234 3 5	46 16 1
	89	Ditto	615 5 6	holds goods				

Several others were inserted in the same way, and wherever the party held a security, or had not produced a voucher, no dividend was allotted; while, where no such objection existed, a dividend was introduced into the last column. Agreeably to this mode of ranking, a dividend of 4s. per pound was allotted to the bill debt of L. 239. 19s. 10d., but none upon that of L. 615. 5s. 6d.

On the 20th March 1811 the dividend was paid to the other creditors agreeably to the above scheme; and no objection was made to the above scheme by Ure and Miller.

Towards the end of that year they brought the goods from Jamaica to Glasgow; and under the authority of the Magistrate, in a process to which Jeffrey was called as a party, they publicly sold them on the 7th March 1812, when they produced a sum which still left a balance due to them of L. 803. 2s. 10d. On the 20th of that month, a second scheme of division of 2s. 6d.

per pound was announced, in which a dividend was allotted to the bill debt, but none to the other, which was left blank as on the former occasion. June 21. 1825.

On the 5th of May thereafter, Ure and Miller lodged a new claim and affidavit for the above balance of L. 803. 2s. 10d.; but Jeffrey refused to receive it, alleging, that from the mode in which they had acted with regard to the goods, they had no legitimate demand against the estate. Ure and Miller then presented a petition to the Court of Session, praying that he should be ordained to receive and rank their claim for the balance of L. 803. 2s. 10d.; and, after a litigation, their Lordships on the 31st January 1819 ordained him to do so, and found him liable in expenses. Ure and Miller then required payment from him of the two dividends of 4s. and 2s. 6d. per pound; and he having declined to do so, so far as related to the sum of L. 515. 54. 6d. they presented a petition and complaint to the Court, praying their Lordships 'to decern and ordain the said William Jeffrey to make payment to the complainers of a dividend on their debt of L. 803. 2s. 10d. as sustained by your Lordships, at the rate of 4s. per pound, with interest at the rate of 4 per cent thereupon from the 20th March 1811; and of another dividend at the rate of 2s. 6d. per pound, with interest at the rate of 4 per cent from the 20th March 1812 till payment; and which dividends ought to have been deposited in the bank to answer the claim of the petitioners.'

In answer to this petition, Jeffrey stated, that he had always been ready to pay the dividend allotted to the bill debt of L. 239. 19s. 10d.; but that with regard to the other, he had, by his schemes of division, announced that no dividends were payable upon it; and that as no objection had been made in terms of the statute, he had paid away the funds, and therefore no claim lay against him. On the other hand, Ure and Miller stated, that the scheme of division did not specify any objection; that it merely bore that they held goods; and they were led to believe that it was only superseded until the produce of these goods, and the consequent balance, should be ascertained; and therefore that they were not bound to make any objection, seeing that Jeffrey ought, in terms of the statute, to have laid aside a dividend to wait the result of the sale of the goods. The Court, on the 13th February 1821, 'sustained the complaint; and found the trustee liable to the complainers for the dividends which they were entitled to draw from the bankrupt estate, but which were omitted to be set apart to answer one of their claims, with in-

Jan^y 21. 1825. 'terest, as prayed for.' Jeffrey having reclaimed, the Court appointed him 'to give in a special and pointed condescend-
'ence, in terms of the Act of Sederunt, of the facts which he
'avers in regard to the practice of trustees on sequestrated es-
'tates, as to ranking and rejection of claims in cases similar to
'that under discussion.'

Thereafter, on resuming consideration of the case, their Lordships 'remitted to, and requested Mr Charles Ferrier, ac-
'countant in Edinburgh, Mr William Scott, also accountant
'in Edinburgh, and Mr William Mowbray, merchant in Leith,
'being persons who have had frequent occasion to act as trust-
'ees in sequestrations in Edinburgh, and three persons (to be
'named by Mr Robert Davidson, advocate) who have had simi-
'lar occasion to act in that capacity in Glasgow, to report whe-
'ther, according to the practice of trustees acting under the
'authority of the statute in the 33d year of his late Majesty,
'chapter 74., the entries in the sederunt-book kept by the peti-
'tioner were, or were not, sufficient to express the judgment of
'the trustee refusing to rank the debt of L. 615. 5s. 6d. claimed
'on by Messrs Ure and Miller for the first and second dividends
'paid from the bankrupt estate; and, secondly, whether, accord-
'ing to the same practice, these entries were or were not sufficient
'to express that funds sufficient for dividends corresponding to the
'ultimate amount of these claims were not retained by the trustee.
Reports were accordingly made by Messrs Ferrier, Scott, and
Mowbray, on the one hand, and by Messrs Cuthbertson,
M^cGavin, and Paul, accountants in Glasgow, on the other. The
former reported, that they conceived that sufficient intimation
of the rejection of the claim had not been made; while the latter
stated, that they were of opinion that, agreeably to practice, it
was sufficient. Thereafter the Court, on the 27th January 1824,
on advising these reports, with minutes, 'adhered to the inter-
'locutor complained of, with this explanation, that the trustee
'having set apart dividends for the claim of the complainers
'ranked as amounting to L. 234. 3s. 5d., which dividends the
'complainers have it in their power to recover in common form,
'with the interest which has accrued thereon, the decerniture
'against the petitioner under this complaint extends only to
'dividends at the rate of four shillings and two shillings per
'pound on the other claim, amounting to L. 615. 5s. 6d., under
'deduction from said claim of L. 46. 6s. 1d. recovered by the
'complainers out of the produce of the consigned goods, with
'interest on such dividends at the ordinary rate payable by banks

‘for the time on monies deposited; and reserve to the petitioner
 ‘any claim competent to him against the creditors drawing
 ‘dividends under the sequestration for relief and indemnification,
 ‘and all objections thereto as accords, and decern.’* June 21. 1895.

Mr Jeffrey appealed.

Appellant.—1. The appellant, as trustee, was entitled and bound to exercise his own judgment in ranking or refusing to rank the claims made on the bankrupt estate. He accordingly exercised it, by refusing to rank, for the first and second dividends, the respondents’ claim for L. 615. 5s. 6d. His judgment was announced by the schemes of division, in which this claim was excluded from the class of claims ranked, and no dividend was set apart for it. It was competent to the respondents to have complained to the Court of the refusal to rank the claim, within the time limited by the statute; but they made no application for this purpose; and the appellant having in consequence distributed the whole realized funds among the other creditors, and not having recovered any funds since the distribution, he is not liable to pay the dividends claimed by the respondents.

2. The appellant’s refusal to rank the claim was distinctly expressed in the schemes, where it is excluded from the class of claims ranked, no dividends are allotted to it, and the reason of refusal is expressed by the words ‘holds goods;’ while, on the other hand, the respondents’ separate claim of L. 239. 19s. 10d. is placed at its nett amount of L. 234. 3s. 5d. among the claims ranked, and dividends are set apart for it. This was the appellant’s judgment in the ranking, which the respondents were bound to know, the schemes being open for their inspection during the statutory period. Accordingly, the Glasgow reporters state, that, according to practice, this was a sufficient intimation of rejection.

Respondents.—1. It is the duty of a trustee, where the amount of a claim is disputed or uncertain, to set apart a dividend corresponding to the utmost amount to which it may be ultimately sustained. If, indeed, he explicitly reject the claim, and his judgment of rejection is acquiesced in, a different rule may be followed. But, in the present case, there was no judgment of the trustee in the sederunt book rejecting the claim, nor any entry which, according to the practice of trustees acting under

June 21. 1822. the statute 33d Geo. III. c. 74. could be held equivalent to such rejection.

2. The sederunt book, when it lay open for the inspection of the creditors prior to the payment of the first and second dividends, not only contained no entries which, either in express terms, or according to the understanding of professional men, indicated a rejection of the claim in question; but it contained nothing which, in fair reasoning, could lead the respondents to conclude, or even to suspect, that the appellant meant to reject their claim, and not to set apart funds to answer its ultimate amount. But even supposing that the entries in the sederunt book left it doubtful whether or not a rejection of the claim was intended, it was incumbent on the appellant to have expressed his intentions clearly, and he, rather than the respondents, ought to bear the loss or inconvenience which has arisen from his misconduct, in violating or neglecting the plain and positive enactment of the statute.

The House of Lords ordered and adjudged, 'that the interlocutors complained of be reversed, and that the defender be assolkied.'

Appellant's Authorities.—33. Geo. III. c. 74. § 35. 39.; Act of Sed. Dec. 14. 1805; Connel, Jan. 16. 1813, (F. C.); 2. Bell, p. 430.

J. RICHARDSON—J. CAMPBELL,—Solicitors.

MAGISTRATES of MONTROSE, Appellants.

No. 48. JOHN MILL, Burgess and Guild-Brother there, Respondent.

Personal Objection—*Burgh Royal*.—Circumstances under which it was held, (reversing the judgment of the Court of Session), That a party making use of a right which he only had under documents challenged by him, to the effect of having them reduced, was barred from insisting that they should be set aside.

June 28. 1825.

2D DIVISION.
Lord Cringletie.

In July 1816, on an application in the name of all parties interested, the Convention of Royal Burghs modified and altered the old set of the burgh of Montrose. The Michaelmas election of that year was, on account of certain irregularities of procedure, declared null and void; and an application, also in the name of all parties interested, was made to the King in Council, for the restoration of the burgh franchise. A royal warrant followed in

1817 for restoring the burgh by poll election, and granting a new set, inter alia giving to the trades and guildry the right of electing councillors, which by the old set had been vested in the council itself. Under this warrant the elections took place in 1817, 1818, 1819, and 1820. John Mill was a burgess and guild-brother. In that capacity he had no right to vote under the old set, but had under the royal warrant. He accordingly voted at the poll election 1817, and at the elections 1819 and 1820. In 1821 he brought an action of reduction of the order of Convention of the 10th July 1816, and the royal warrant of 1817,* and concluded that the Court of Session should declare, 'that all and each of the annual or Michaelmas elections of magistrates and councillors made in the said burgh of Montrose, posterior to the poll election of 1817, are and have been null and void, because not made in terms and in the form prescribed by the ancient and legal set of the burgh before recited, as recorded in the books of the Convention of Burghs in 1708; and, in particular, it ought to be found and declared, that the election made or pretended to be made at Michaelmas 1820 was and is illegal and void, and any election made or to be made by the persons then chosen is void and ineffectual; and all warrants granted by the present or future magistrates of Montrose, in civil or criminal cases, are illegal, void, and ineffectual; and all intromissions with the funds or revenue of the burgh by them or their pretended successors are illegal and ineffectual, and that they are liable as individuals, conjunctly and severally, to account for the funds with which they so intromit: and it ought to be declared by decree foresaid, that the said burgh is without a legal magistracy and council, and that no new election can be made without a royal warrant; and these things being so found and declared, our said Lords ought to appoint interim managers to administer the affairs of the said burgh till our royal warrant be granted authorizing a new election.' The defenders called were the individuals elected at Michaelmas 1820 as magistrates and councillors of the burgh. They maintained in defence, that the pursuer had 'no title to insist;' that there was no competent process, all parties not having been called into the field; and that the pursuer was barred personali exceptione in respect of his own

June 28. 1825.

* He afterwards brought a supplemental action reductive of the poll election 1817, which summons was remitted to the Lord Ordinary; no further proceedings in it occurred, and it was not appealed.

June 28. 1835.

acts and proceedings. The Lord Ordinary observed in a note,—
 ‘ The pursuer challenges the alteration of the set of the burgh
 ‘ made by the Convention in July 1816; 2d, The royal warrant
 ‘ in September 1817; and the elections made in each year at
 ‘ Michaelmas since the poll election,—all as null and void. The
 ‘ poll election itself is therefore not complained of, but, on the
 ‘ contrary, seems to have been admitted to have been good. The
 ‘ Lord Ordinary could have understood this admission, if the
 ‘ number of the council had been limited to seventeen, which is
 ‘ the number by the old set of the burgh; but, if he be not mis-
 ‘ taken, the number of the council, by the royal warrant, is made
 ‘ to be nineteen, which it states to be as formerly the number.
 ‘ Now, this was the number introduced by the act of the Conven-
 ‘ tion which is complained of, and is not the number of the old
 ‘ set; and, consequently, the pursuer will judge whether he can
 ‘ hold the poll election of nineteen persons to be good, and yet
 ‘ complain of that innovation. Secondly, It is stated by the
 ‘ defenders, that the proceedings in 1817 were reported to his
 ‘ Majesty by the Sheriffs authorized to preside in and regulate
 ‘ them, and that they were ratified by the King. This ratifica-
 ‘ tion is not called for, nor sought to be reduced. The Lord
 ‘ Ordinary only mentions these particulars to prevent future
 ‘ trouble and expense; for if this action shall proceed, and it
 ‘ shall be found that the pursuer has a title to insist in it, the
 ‘ summons ought to be formal and correct before avizandum
 ‘ be made with the cause. Of this, however, the pursuer must
 ‘ judge for himself.’

There was thereafter subjoined another note in these terms:
 —‘ In so far as the Lord Ordinary’s own idea of the merits
 ‘ of the points now at issue goes, he thinks that there is a dis-
 ‘ tinction between a person consenting to acts or deeds which
 ‘ are lawful, but from which he is at liberty to withhold his con-
 ‘ sent, and deeds which are illegal, to which he gives his con-
 ‘ sent. In the former case, his consent, either directly or indi-
 ‘ rectly given, by ratification express, or presumed by acts of ap-
 ‘ probation, will bar him from challenging the deed so ratified;
 ‘ but in the other case, consent to an illegal deed, or even grant-
 ‘ ing it, will not prevent a challenge. Of this nature are pacta
 ‘ turpia, bonds granted for an unlawful consideration, which may
 ‘ be called in question by the granter of them; and of the same
 ‘ sort the Lord Ordinary would consider an unlawful application
 ‘ to the Sovereign, either for the alteration of the set of a burgh,
 ‘ or any other purpose. The Lord Ordinary desires it to be

‘understood, that he does not mean even to insinuate at present that an alteration of the set of Montrose was illegal. That would be entering into the merits of the question, which at present is not competent. He only gives, as an instance, that if the application was illegal, the pursuer would not be excluded by personal exception, arising from his having been one of the applicants, from pursuing a reduction to have it set aside; and, of course, no after proceeding following out the illegal grant could take away the right of challenge.

‘The Lord Ordinary also thinks, that as the present magistracy represent the burgesses, there is no necessity for calling the latter; and if such form were necessary, the matter would be inextricable, as burgesses would be daily admitted, whom it would be necessary to call, and to sist process till they were made parties, whereby the case would never be decided.

‘As to the right of a burgess to set aside an election, there certainly is a wide distinction between complaining of the election itself, and the right or warrant in virtue of which the election was made; and if it be not competent to a burgess to complain of the latter, the greatest iniquity may be practised. But of all these points the Court will judge, and it is better that the cause shall go directly before them.’

Information having been ordered to the Court, their Lordships (28th January 1824) repelled the ‘objections to the pursuers’ title to insist in this action.’*

The magistrates appealed.

Appellants.—This is a mere preliminary inquiry, and altogether exclusive of any discussion of the merits. 1. The respondent, as an individual burgess, has no legal title to pursue, neither has he any interest. It is only under the set he is desirous of reducing that he has a vote; under the old set he had none. 2. All the parties have not been called into the field. The guildry and seven incorporated trades, who yearly elect the majority of the council, ought to have been cited. 3. The respondent was a party to the application to the Convention of Royal Burghs, and to the King in Council, and acted under the warrant from the Crown, and had no right to interfere or act under the old set; he is, therefore, barred personali exceptione from bringing the present action.

* 2. Shaw and Dunlop, No. 618.

June 22. 1825.

Respondent.—1. Every individual burghess has an interest and title to insist that the burgh shall be legally governed, and its jurisdiction and revenues put into the hands of proper administrators. 2. Other parties being interested in the question in dispute, affords no legal exception to the respondent's title to pursue. The proper parties have been called. 3. The circumstance that the respondent did not dissent from the application to the Convention of Royal Burghs, or to the Crown, or that he voted at elections posterior to the act of convention and royal warrant, affords no legal objection against his title to challenge this act and warrant as illegal. He submitted at the time to high authority, but in political questions such submission does not make illegal acts valid, or prevent members of the community from afterwards vindicating their rights in a constitutional form.

The House of Lords ordered and adjudged, ' that the interlocutors complained of be reversed, and that the action be dismissed.

LORD GIFFORD.—My Lords, In a case in which the Provost and Magistrates and Town-Council of the Burgh of Montrose are the appellants, and John Mill, flax-dresser in Montrose, is the respondent, there was an appeal against certain interlocutors of the Court of Session, by which they had decided against a preliminary objection, that the right of Mr Mill to bring the action in question was not well founded, in respect that he had no title to pursue in the action,—that he was barred *personali exceptione* from bringing the action by his own acts done in the burgh, and proceedings in obtaining the documents sought to be reduced, and that the proper defenders were not before the Court.

My Lords,—This was an action brought by Mr Mill, a burghess in Montrose, to set aside certain elections which had taken place in that burgh since the year 1817, in the years 1818, 1819, and 1820, and also to set aside the royal warrant by which a new set was granted to the burgh. My Lords, it appears that, before the year 1816, this burgh of Montrose consisted of a town-council, which was composed of seventeen merchants and two tradesmen, including in the number the provost, three bailies, the dean of guild, the treasurer, and the master of the hospital. The annual election was upon Wednesday immediately before Michaelmas, unless Michaelmas fell upon Wednesday, and then the election was upon Michaelmas day. The old council elected the new, with this restriction, that the provost, the three bailies, the dean of guild, the treasurer, and the master of the hospital for the immediate preceding year, were continued *ex officio* members of the council for the year immediately following. The old and new council leet two of the new council, out of which they choose the provost; and then they leet six of the new council, out of which

June 28. 1825.

they choose the three bailies; and then the new council chooses the dean of guild and his assessors; and then also, or at any time betwixt that and Martinmas thereafter, they choose the treasurer, and between that and the first of January they elect the hospital master. The provost cannot be continued longer than two years together, and the bailies cannot be continued longer than three years together in their respective offices. The dean of guild may be continued as long as the council think fit. The treasurer and hospital master can only be continued for two years together. This set was considered too limited, and there was an alteration made in the set in the month of July 1816; but notwithstanding that alteration, at Michaelmas 1817 certain irregularities were committed in the course of the election; and on a petition and complaint the Court of Session declared that election to be null and void. In this situation it became necessary to apply to the King in Council for a restoration of the burgh franchise. That application was made, and a crown warrant was granted in 1817, and by that crown warrant a new constitution is given to the burgh. That warrant directed the election of the officers of the burgh to take place on the 13th of October 1817, with continuation of days, of which the Sheriff-depute of the county should give public notice, and that they should then proceed to fill up the vacancies. There were various alterations made in the set. This crown warrant was acted upon in 1817 by a poll election taking place; and from that time to the commencement of this action, the affairs of the burgh have been conducted under this new constitution. It appears that Mr Mill, the pursuer in this action, is a burgess and flax-dresser, who, previously to the grant of this new set in 1817, had no privilege or right to interfere in the election of its officers, but in consequence of this new set he became entitled to vote; and it appeared, that from that time to the commencement of the action, he had regularly concurred in the various elections that had taken place. I should state to your Lordships, that in the action which your Lordships have now to consider, the respondent did not seek to reduce the poll election of 1817. In the first summons he said nothing as to that, but only as to the other elections. It is, however, introduced into the supplemental summons, which we have nothing to do with. Upon that action being brought to reduce all those elections, it was objected that Mr Mill was not a party entitled to complain of those elections,—that he had taken a benefit under the warrant that he did not possess before,—that he had availed himself of the privilege then first conferred upon him, and could not now seek to set aside the warrant. It was also objected, that this action of reduction was brought against the officers only, without calling before the Court the several incorporated trades and guildry, upon whom considerable privileges were conferred, and that they ought to have been made parties. To this it was answered, that though they might be interested in the general question, yet that they were not interested in discussing this preliminary objection; and fur-

June 28. 1825. ther, that it was competent for this gentleman, under the circumstances, though he had acted under them, to reduce and set aside these elections. After the case had been heard, the Court of Session disallowed the objections to the pursuer's title.

My Lords,—Against this interlocutor this appeal has been brought. Your Lordships will perceive that in this appeal the merits of the case are not before your Lordships, whether it is competent to reduce this warrant granted by the Crown, and grant a new set or not; but the real question before your Lordships is upon the preliminary objection, whether, supposing the appellant has a right to pursue as a burghess, upon which there has been considerable discussion at your Lordships' Bar, he was or not barred *personali exceptione* in respect of his own acts. My Lords, upon considering this case, it does appear to me that this gentleman was barred *personali exceptione*. He had no right to interfere with this election previous to the new set; and when this new set confers upon him an advantage, shall it be competent to this gentleman, who has been availing himself of this privilege, to turn round and say, It is very true I have so done, but it is all wrong? In this part of the island, there would be no difficulty upon it; but perhaps the House ought not to allude to the analogies that may prevail here. I should state, that this was not the unanimous decision of the Court below. One of the learned Judges, Lord Pitmilley, differed from the others. He says, 'that this party, making use of a right which he had not before, and which he never had but under the documents now sought to be reduced, is barred from challenging those documents.' My Lords, I think, although it is not necessary to determine the point, it is a point very well worthy of consideration, whether the proper parties were before the Court. The only persons called before the Court were the officers elected in 1820, who represented the burgh for that year. The question is, Whether the incorporated trades and guildry have not a material interest in the question to be discussed, whether this was not to be considered a valid set or not? Lord Pitmilley is of opinion they had. Upon that point he says, 'I am of opinion that the proper parties have not been called. The guildry and seven trades must be called. The magistrates are not proper parties. They have no interest, or very little; not enough in a declarator to call them only; and I would say the same in a reduction, if this was the proper time.' Therefore, under the whole of these circumstances, I should propose to your Lordships to reverse the interlocutor pronounced, being of opinion, that as he was barred by *personali exceptione*, it is incompetent for him to pursue this action. This decision only goes to the competency of this action by this party: the question may still be discussed, if the parties are so inclined, whether this warrant can be reduced by the Court of Session; or whether the Crown has exceeded its powers in granting this warrant? But it does appear to me, that, in this case, the present respondent cannot sustain this action, and that the interlocutor must be reversed.

Appellants' Authorities.—Livingstone, July 13. 1806, (10,423.); Charters, Feb. 15. June 28. 1825. 1887, (5650.); Mason, Nov. 15. 1821, (1. Shaw and Bal. No. 173.); Burgesses of Inverury, Dec. 14. 1820, (F. C.); 1. Ersk. 4. 23.; Cowan, June 23. 1782, (16,133.)

Respondents' Authorities.—3. Ersk. 3. 47.; Archbishop of St Andrews, March 12. 1784, (5699.); Chalmers, Feb. 27. 1698, (5698.); Bell on Election Law, p. 491.; Guild, Dec. 21. 1809, (F. C.); Anderson against Magistrates of Wick, Feb. 17. 1749, (1842); Anderson against Magistrates of Renfrew, June 30. 1752, (16,123.)

J. CAMPBELL—A. MUNDELL,—Solicitors.

PATRICK PEARSON, Writer in Edinburgh, Appellant.

No. 49.

WILLIAM JACK, with concurrence of his Majesty's Advocate,
Respondent.

Dict.—The Court of Session having in general found a party guilty of various charges made against him in a petition and complaint; a remit made ex parte to review the judgment, and state in what respects he had been guilty.

THE appellant, Patrick Pearson, writer in Edinburgh, was originally an agent in the Sheriff Court of Fifeshire, and in that capacity he was employed by Thomas Malcolm to recover from one Meldrum a debt of L. 121. He obtained decree against Meldrum for that sum and expenses, which, with those of diligence, enlarged the debt to L. 169. 17s. 3d. For payment of this sum Meldrum, along with other parties, accepted a bill, drawn and indorsed by the respondent William Jack, merchant in Cupar Fife, and which was thereupon delivered to Pearson as Malcolm's agent. The bill was discounted by Pearson, and it having been dishonoured, diligence was raised upon it against all parties, and a partial payment was made, which reduced the debt to L. 103. 17s. For this sum a second bill was drawn and indorsed by Jack, accepted by the other parties, and delivered to Pearson. This bill was also dishonoured, duly protested, and notice given to all concerned. Letters of horning were then raised, in the recital of which Jack's name was mentioned, but it was omitted in the will. The letters were thereafter transmitted to a messenger of the name of Millie, whom Pearson was in the practice of employing, and for whom he was cautioner, to execute them against all the parties. At this time Pearson was abroad, and the matter was attended to by his partner. No execution was returned by the messenger; but he had begun one on the back of the diligence, which he had left unfinished. He

June 28. 1825.

1st DIVISION.

June 28. 1825. afterwards rendered an account to Pearson, in which there was a charge made for 'executing horning, Pearson v. Jack.'

Some time thereafter, a dispute having taken place between Malcolm the creditor and Pearson, the former raised an action, alleging that Pearson by his conduct, and particularly by taking the bills, and not doing sufficient diligence, was liable for the debt, and therefore concluding accordingly. In defence, Pearson denied his liability, and (on the supposition that he was responsible) pleaded certain counter-claims, arising out of accounts of business. After some proceeding, the Lord Ordinary decreed to a certain extent against Pearson, who lodged a representation, contending that he was not liable for the debt; and his agent wrote to the messenger, requiring him to return an execution against Jack. Before, however, any answer was received, the omission of Jack's name in the will of the letters had been discovered by the counsel for Malcolm, who founded upon it as conclusively establishing that no diligence had been done against Jack. On the other hand, Pearson alleged, that, so far as he was concerned, he had performed his duty, and that in point of fact Jack had been charged. The Lord Ordinary, on the 13th June 1822, pronounced this interlocutor:—'In respect that a demand is now made by the pursuer, for having the defender found liable for the whole sum of L. 169, contained in the bill by Jack and Meldrum, and that the defender alleges he is not liable for that debt, in consequence of his having done due diligence against the parties by whom it was due; appoints the defender to give in a condonation, in terms of the Act of Sederunt, of the facts and circumstances he avers and offers to instruct, in order to shew that such diligence was done by him; and to accompany said condonation with production of any execution of the said diligence against Jack which may be in his possession.'

On the 17th Pearson wrote to Jack, desiring him to 'send me the charge of horning served upon you 16th November 1816 for the debt;' and at the same time he wrote to the messenger to return an execution of that charge, which formed an item of his account, and stated to him, 'There is no doubt you gave a charge to Jack. But as his name is not in the will of the horning, you seem to have stopt short with the execution. You will determine how far you are at liberty to send me a separate execution still. It may assist our argument on the point of expenses. It cannot hurt you; for I will guarantee you against all injurious consequences.' The messenger accordingly transmitted an execution; but he stated in his letter, 'that the execution against

June 28. 1825.

‘ Jack can have no faith in judgment, as I had no warrant for executing it against him, he being kept out of the will.’ He, however, afterwards deponed, that he had actually given a charge to Jack on the 16th November 1815, being the date stated in the execution. It was then produced in process, and on the 9th of July Pearson sent a notice to Jack, intimating, ‘ that the charge given you for this debt upon the 16th November 1815, (or of whatever date the said charge may have been given), is hereby departed from; it having been discovered, since said charge, that your name is in the body of the letters of the horning then raised and executed, but not in the will, whereby the charge is inept.’

Malcolm, alleging that Pearson had been guilty of an irregularity in obtaining the execution from the messenger, threatened a petition and complaint to the Court, and Pearson, in order to buy his peace, paid the full claims with expenses. As indorsee of the bill, Pearson then raised new letters of horning against Jack, and executed arrestments. Jack thereupon notified to him, that unless he abandoned all claim against him, he would immediately present a petition and complaint to the Court, founded on the circumstance of having obtained the execution. In this matter the same agent who had acted for Malcolm was employed by Jack. Pearson having refused to submit to the proposed terms, Jack, with concurrence of the Lord Advocate, presented a petition to the Court, setting forth, ‘ That the petitioner feels himself called upon to bring under the view of your Lordships certain proceedings, which have been held upon the part of Mr Patrick Pearson, lately writer in Cupar-Fife, now writer in Edinburgh, the object of which appear to be, by means of a false execution of a charge of horning, which the respondent Mr Pearson prevailed upon one Millie, a messenger, (for whose faithful execution of his duty he is cautioner), to fabricate and grant, for the purpose of being founded on as evidence of the existence of a debt alleged to be due by the private complainer to the respondent Pearson.’

These allegations were denied by Pearson, who stated, that he was not aware of the omission of Jack's name in the original letters of horning till the discussion took place with Malcolm; that it then became of importance, in relation to the question depending between them, to ascertain whether, in point of fact, a charge had been given to Jack; and that with that view, and not for the purpose of following up the diligence, the execution of the messenger, stating what had actually occurred, was procured; and accordingly that an intimation was immediately made to Jack

June 28. 1824. that the charge was departed from. On advising the proceedings the Court (Feb. 11. 1824) ‘sustained the petition and complaint; repelled the defences, declared the conduct of Patrick Pearson was unwarrantable and illegal, and decerned accordingly; found the said Patrick Pearson liable in full expenses, and further, ordained the petition and complaint, with the present deliverance thereon, to be engrossed in the books of sederunt.’ To this interlocutor they adhered on the 10th February 1824, and thereafter decerned against him for L. 238. 17s. 4d. of expenses.*

Pearson appealed, but no Case was lodged by Jack; and although he appeared, he was not heard, as he declined to pay the costs of the day, and to lodge a Case.

Appellant.—By the interlocutors of the Court of Session, the appellant has suffered, as a professional person, the severest punishment, short of actual deprivation, which the forms of Court can allow. By leaving undefined the extent of the irregularity imputed to him,—by sustaining, in general terms, a complaint containing charges the most calumnious and ill-founded,—by ordaining the petition and complaint containing these charges to be entered in the records of the Court, unaccompanied by any explanation on the part of the appellant,—by omitting to state specifically the true nature of the irregularity of which the appellant was found to be guilty,—the interlocutors have, in truth, convicted him of various offences, of which the appellant, according to every rule of evidence, must stand acquitted, and of which he has no reason to think that the Judges of the Court believed him to be guilty. Add to all this, the appellant has been punished, at the suit of a private party, who had no conceivable interest in the matter at issue,—who originally threatened the appellant with this complaint for purposes of extortion, and afterwards, when disappointed in that scheme, persevered from motives of malignity.

The House of Lords ordered, ‘that the cause be remitted back to the Court of Session, to review the interlocutors complained of, and particularly to consider whether the whole of the charges in the petition and complaint were sustained; and if the Court should be of opinion that the whole were not sustained, then to consider in what respect the conduct of the said Patrick Pearson was unwarrantable and illegal; and after so reviewing the interlocutors complained of, the said Court do and decern in this cause as may be just.’

* See 2. Shaw and Dunlop, No. 657.

LORD GIFFORD.—My Lords, There was a case heard the last time June 28. 1825.
I had the honour to attend your Lordships, in which a person of the name of Patrick Pearson was appellant, and a person of the name of Jack was the respondent. The respondent did not appear to support the interlocutor which had been pronounced,—he had not put his Case upon your Lordships' table, and declined to accede to the terms of paying the costs of the day. When the appellant appeared it was proposed that the appeal should be adjourned, which he declined, and therefore it was heard *ex parte*.

My Lords,—This case arose upon the respondent's preferring a very serious complaint against the appellant as to his professional character. The petition of complaint contained a variety of charges affecting the appellant:—first, That he had, by undue influence over the messenger, produced a false execution of a charge of horning; secondly, That that execution was procured in order to be used as evidence of a debt due by Jack to the appellant; and, thirdly, That no such debt was truly due: and there are a variety of allegations in the petition of complaint in confirmation of those charges. My Lords, a variety of proceedings had taken place in the Court below, with respect to the recovery of a sum of money by the appellant, due to a person of the name of Malcolm, for which Mr Jack, the respondent, was one of the parties liable. The proceedings have extended to a very considerable bulk; but the Court of Session finally were of opinion that this interlocutor should be pronounced:—‘The Lords having resumed consideration of and advised the petition of William Jack, with answers, ‘duplies, productions, and whole cause, sustain the petition and complaint, repel the defences, declare the conduct of Patrick Pearson ‘in the premises was unwarrantable and illegal, and decern accordingly: find the said Patrick Pearson liable in full expenses; remit to ‘the auditor of Court to tax the same and to report; and further, ‘ordain the petition and complaint, with this present deliverance ‘thereon, to be engrossed in the books of sederunt.’

My Lords,—I think no one who has heard this case, or read these papers, can doubt that the conduct of Mr Pearson was certainly not to be justified in some particulars stated in this petition of complaint; but he complains of this sentence, because the Court have sustained the whole of the petition of complaint, containing charges the most calumnious and ill-founded, and because the Court have ordered the petition of complaint to be registered in the books of sederunt, unaccompanied by any explanation on the part of the appellant. Now, my Lords, as to a great variety of the charges in the petition of complaint, first of all, the appellant has denied them, and has offered to go into proof to negative them; and he contends, that under these circumstances the Court could not with propriety affirm the truth of all the allegations in this petition of complaint; and he contends, that, even if his conduct was unwarrantable and illegal in certain particulars, —and (if I am to give an opinion) I have no hesitation in saying it

June 28. 1825. was,—that those particulars, as an act of justice to him, should have been specified in the interlocutor which the Court pronounced, which was to be engrossed among the Acts of Sederunt, there to remain a perpetual record of this charge against him. I should also state to your Lordships, that with respect to the conduct of Mr Jack, the respondent, very considerable animadversions were passed upon him for his conduct in this case; but the Court have said, although his conduct was very reprehensible, yet having brought the conduct of a professional man before them, the only question for them was, whether the petition and complaint was supported or not? This interlocutor goes to support the whole petition of complaint, and directs it to be engrossed upon the books of sederunt.

My Lords,—Every one must be sensible how important it is to Courts of justice to watch over the conduct of the professional persons concerned in them; and when they are found conducting themselves improperly, how absolutely essential it is that they should receive the censure of the Court: the only difficulty I have in considering this case is, whether the Court of Session have not gone too far in sustaining the whole petition. It is well known to many of your Lordships, and those particularly who have had any experience in the consideration of causes from the Courts of Scotland, that it does very frequently happen that they affirm the general conclusions of a petition of complaint by the terms of the interlocutor, where there has not been an intention to confirm all those conclusions. In this case I think the Court themselves should point out the distinct allegations that they think have been proved against the party. I should be very unwilling to advise your Lordships to make any alterations in an interlocutor of this description, but I think that that should be done in order to do justice to the conduct of this person. Looking at the whole of the circumstances of this case, I would suggest to your Lordships, whether it would not be desirable that the Court of Session should review this interlocutor, for the purpose of embodying in it such parts of the charges as they think are proved. I see it is said by one of the learned Judges, whose dissent appears to be founded upon the conduct of Mr Jack, that Mr Jack's conduct was such as not to entitle him to come into a Court of justice to complain. With your Lordships' permission I would therefore propose, that this case should be remitted to the Court of Session to review the interlocutor complained of, and particularly to consider whether the whole of the charges in the petition of complaint were sustained; and if the Court should be of opinion that the whole were not sustained, then to consider in what respect the conduct of the said Patrick Pearson was unwarrantable and illegal; and after so reviewing the said interlocutor complained of, the Court do decern in this cause as may be just. It is very difficult to discover by this interlocutor, comparing it with the notes I have of their judgment, whether they meant to affirm all the charges in the petition of complaint, or whether they did not mean to confine themselves to some of those charges.

Under these circumstances, if that was the case, I would suggest, whether it would not be justice towards the individual that the specific charges considered proved should be specified, with respect to which they considered his conduct deserving of that censure which the Court has passed upon it. Under these circumstances, I should propose to remit this cause in the terms I have stated. June 28. 1825.

J. RICHARDSON,—Solicitor.

JAMES FORBES, and Others, Appellants.

No. 50.

FRANCIS SMYTH, Respondent.

Salmon Fishing—Property.—A party holding a right of salmon fishing, found, in a question with an adjacent heritor, (affirming the judgment of the Court of Session), to have no right to erect rights and towing-paths on the alveus of the stream: But the House of Lords remitted to the Court of Session to inquire, whether a bulwark or embankment, built by the adjacent heritor against the stream, was so constructed as to be injurious to the right of fishing in the water, and in a manner not necessary to its utility as a bulwark or embankment.

THE river Findhorn runs into the Moray Frith. Before reaching the estuary, it divides into two branches, passes the lands of Waterford, leaving, for a space, Waterford on the east of the eastmost branch. Twenty years ago, the river forced, for a short distance, a third branch through a portion of the Waterford lands, and then rejoined the centre stream: thus creating an island partly out of that property. This new course was shut up, but again broke out; and the proprietor of Waterford embanked his lands against farther encroachment. He had no right of salmon fishing. That belonged to Forbes of Echt, whose right, however, was solely of the fishing, having no property on either side of the river. Smyth bought Waterford, and found there the embankment raised against the east stream.

From the nature of the channel, the river, it was said, could not be advantageously fished without certain erections to facilitate the operations of the fishermen. These consisted, 1st, Of sights, i. e. subaqueous ridges thrown across, which, rendering the water shallow at that spot, disclose the salmon passing over,—or which, in the language of the old conveyancers, ‘market the fishes kyth above the said fords;’ and, 2d, Towing-paths to give the fishermen solid footing in drawing the nets. Accordingly, Forbes and his lessees made a towing-path across the mouth of the centre

June 28. 1825.

1st DIVISION.
Lord Meadowbank.

June 28. 1825. channel, from the west bank to the end of the island; and :
'sight' from the island across the third branch to Waterford's
embankment. Thereupon Smyth applied to the Sheriff of Mo-
rayshire to prohibit Forbes and his lessees 'from placing or lay-
'ing stones, stakes, or gravel, in any part of the river Findhorn
'opposite to the petitioner's lands, and from making any erection
'whatever therein;' and to ordain the dykes, &c. to be removed.
The Sheriff found, that Forbes and his tenants had no right to
place obstructions of any kind in the river, and ordained their
removal. Thereafter, the Sheriff allowed them 'a proof of their
'allegiance of having been in the practice, either by themselves
'or their predecessors, of placing stones, stakes, and making
'erections, in the bed of the river, in the same way, and in that
'part thereof, for which they are now complained on, for a
'period of seven years past.' To this limitation they objected,
but the Sheriff adhered. Forbes and his lessees then raised an
action of declarator before the Court of Session, setting forth,
that they and their predecessors had been in the habit, for time
immemorial, in the exercise of their rights of fishing in the
Findhorn, of constructing sights and ridges in the channel,
and towing-paths and gangways, where requisite, along the
banks of the river, and its branches and streams: that they
had been of late molested and interrupted in the exercise of
these rights by Smyth, who also, in prosecution of what had
illegally been begun by his predecessor, had unwarrantably
constructed, enlarged, and completed a bulwark along the
river and its branches, to their great hurt and prejudice in the
exercise of their rights of fishing: and concluding that it should
be declared, 'that neither Smyth, nor any person deriving
'right from him, have any right or title to interfere with or pre-
'vent the pursuers from so doing, or to interfere in any way
'with the pursuers in the exercise of their said rights, or to
'make or construct any bulwark or embankment along the
'course of the said river, or of any of its branches or streams,
'that may be to the hurt and prejudice of the pursuers in the
'exercise of their said rights of fishing: and the said Francis
'Smyth ought and should be decerned and ordained, by decre
'foresaid, to desist and cease from troubling or molesting the
'pursuers and their servants in the exercise of their said right
'of salmon fishing in the said river Findhorn, and the several
'branches or streams thereof, conterminous to his lands, and in
'erecting and repairing sights and towing-paths, so far as neces-
'sary for that purpose in the channel, and along the banks of

‘the said river, and of the different branches thereof; and also
 ‘the said Francis Smyth ought and should be decerned and
 ‘ordained, by decree foressaid, to remove and take away the
 ‘aforessaid bulwark or embankment unwarrantably and illegally
 ‘erected by him and his predecessor on the said river and its
 ‘branches, and prohibited and discharged in all time coming
 ‘from making or constructing any bulwarks or embankments
 ‘along the course of the said river or its branches, to the hurt
 ‘and prejudice of the pursuers in the exercise of their said right
 ‘of fishing in time to come.’ The advocacy was also brought
 into Court ob contingentiam. June 28. 1825.

A remit was made to a surveyor, ‘to frame and report a sketch
 ‘of the river and adjacent banks, and encroachments complained
 ‘of.’ He reported, ‘I have made an accurate survey of the
 ‘lands of Waterford, with the embankment, the run of the river
 ‘at its lowest or summer state, also of the sight and the gang
 ‘or towing-path,—all which is laid down and explained in the
 ‘plan to which this report refers; and I am of opinion, that the
 ‘embankment, which is now completed along the whole lands of
 ‘Waterford in a most substantial manner, is liable to frequent
 ‘injury by the sight damming back the water on said lands, and
 ‘also by the gang or towing-path throwing the river over to
 ‘the Waterford side; and both these dykes, which I am inform-
 ‘ed are but of recent erection, or only of a few years’ standing, I
 ‘think must have a very great tendency in winter, and in time
 ‘of ice, to detain and fill up the channel, so as to bear severely
 ‘on the embankment. Indeed this seems to have been the case
 ‘in winter last; a breach of seventy feet was made, and which
 ‘is now repairing.’ The Lord Ordinary, in as far as the report
 touched matters not specially remitted to the surveyor, found
 ‘it was ultra vires, and was to be held ultroneous and non
 ‘scripto.’ The parties then condescended. Forbes and lessees
 alleged, that to fish the Findhorn with advantage, sights at pro-
 per places in the channel, and paths along the banks, where
 without paths the banks do not afford sufficient passage, are
 necessary: that the right of making these has immemorially,
 and for more than forty years, been understood to be in the pro-
 prietors of the fishings as part and pertinent of the right; and
 they have been made for that period at every part of the river
 where necessary and proper: that the river being liable to
 change its course, the proprietors of fishings followed it, and
 exercised their rights in it: these sights were often higher, and
 often as high, as the sights complained of; that the present sight

June 28. 1824. was made necessary by the shifting of the river: that the towing-paths were made by cutting and levelling the banks, and placing wood and gravel in the stream when necessary. Anciently, the town of Forres possessed and exercised these rights. In later times, and when, from the shifting of the river, it became necessary, there was a foot-path or gang-way made of brushwood or gravel opposite Waterford, for the purpose of towing. No interruption to such erections has been met with from any neighbouring proprietor. The pursuers did only what was necessary to their fishing, and created no injury to the defender. The defender's embankment is so constructed as to be injurious to the fishing, particularly from preventing the fishers from passing along the bank, and towing their cables, a circumstance not necessary to the utility of the embankment; and this the pursuers offered to prove. On the other hand, Smyth alleged, that whatever might be on other parts of the river, the pursuers never had erections on any part of the river opposite Waterford: that to make sights and towing-paths was not a part and pertinent to salmon fishing: that the tolerance (if any) of other proprietors did not bind the defender: that he was not answerable for the fishings continuing profitable: that a right of fishing gives no privilege of cutting banks, and placing gravel or wood in the alveus of the stream: that there is the reverse of authority for holding that the encroachments complained of were made with impunity by the town of Forres; and that the foot-path or gang-way was on the lands of another proprietor, and not opposite to Waterford: that the new course the river had taken exposed the defender's lands to great danger, and justified building his embankment: that the danger was manifestly increased by the towing-path, composed of a stone-dyke two feet high, running across the centre channel; and the sight, a similar structure, across the eastern channel. Already these erections had caused a breach in the embankment to the extent of seventy feet. The Lord Ordinary ordered informations to the Court, who (29th January 1824) sustained the defences in the action of declarator, and repelled the reasons of the advocacy.*

The pursuer appealed, and repeated his statements,—1st, contending for the legality of sights and towing-paths; that they were necessary for the appellants, and not injurious to the re-

* 2. Shaw and Dunlop, No. 646.

spondent; that the appellants' right to make such structures is protected by prescription: 2d, alleging, that the respondent's bulwark excludes the appellants from towing or drawing their nets on the east side, and encroaches in some places sixty yards into the bed of the river, and has converted into corn-land a space where the appellants have formerly killed salmon,—all which they offered to prove. June 28. 1825.

The respondent repeated his former statements, and denied, 1st, that the appellants had any legal right to make the erections complained of, or that a prescriptive right elsewhere could have effect on a short and challenged possession opposite Waterford; and alleged that he had suffered injury: and, 2d, that he was entitled to protect his lands from being flooded; and that the allegation as to encroachment on the bed of the river had not entered into the appellants' condescendence or answers in the Court below, and was now, without any authority in fact, hazarded to give a better complexion to their case.

The House of Lords ordered and adjudged, 'that the interlocutors complained of be affirmed, except in so far as, in the action of declarator, they sustain the defence and assoilzie the defender from the conclusions of the libel respecting the bulwark or embankment erected against the river Findhorn; as to which part of the said interlocutors it is ordered, that the cause be remitted back to the Court of Session to review the same, and to inquire, in such manner as the said Court may think right, whether the said bulwark or embankment is so constructed as to be injurious to the right which the appellants have of fishing in the said river, and in a manner not necessary to its utility as a bulwark or embankment.'

LORD GIFFORD.—My Lords, In the case of *Forbes v. Smyth*, the appellants are James Forbes, Esq. of Echt, and Messrs Forbes, Hogarth and Company, merchants of Aberdeen, who are entitled to a salmon fishery upon the river Findhorn; and Francis Smyth, Esq. of Waterford, is the respondent. It appears, my Lords, that this river, at the place in question, divides itself into two principal branches, and one of those branches passes by the lands of the respondent, Mr Smyth; and, in order to protect these lands from the inroads of the river, his predecessor erected what is called a bulwark or embankment against the river, by which bulwark and embankment the appellants say their right in the salmon fishing has been injured. It seems, in order to facilitate the catching of the salmon, that the appellants had made what is called a sight. They had raised a ridge of stones or gravel in

June 28. 1826. the course of the river, over which the salmon must pass, and which would secure their being taken higher up the river; and on the opposite side of Mr Smyth's land they had made a towing-path, in order that they might walk along this towing-path to haul their nets. In consequence of this, the respondent complained that his rights were injured by this sight and towing-path; that he had sustained an injury by the hindrance of the water in passing through his lands; and he made an application to the Sheriff of Morayshire, complaining of the operations, and praying for an interdict against placing any obstructions in the river, and that the appellants should be ordained to remove any obstructions which they had already placed there. That interdict was granted, and the Sheriff found, that the defenders had no right whatever to place obstructions of any kind in the river in consequence of their right of fishing, or to make any alterations in the bed of the river; and, therefore, he ordained them to remove the stones, stakes, and gravel placed therein. Against this interlocutor the appellants presented a petition to the Sheriff, who allowed the defenders a proof of their allegiance of having been in the practice, either by themselves or their predecessors, of placing stones, stakes, and making erections, in the bed of the river, in the same way and in that part thereof for which they are now complained on, for a period of seven years past. The fact was, however, (as it is stated in the respondent's Case), that no possession in that part of the river could be alleged for seven years; and therefore Messrs Forbes and Company gave in two successive reclaiming petitions against the limitation imposed upon them by the Sheriff's judgment; and the Sheriff having adhered by refusing these petitions, Messrs Forbes and Company commenced an action of declarator in the Court of Session against the respondent, in their own name, as well as in the name of William Forbes, Esq. proprietor of the fishings, and Colonel Grant of Moy, another proprietor of fishing in this river; and at the same time they presented an advocacy of the process before the Sheriff, to be conjoined with their action of declarator. In their action of declarator they sought to have it declared, that they had a right to make these sights and towing-paths in the channel and along the banks of the river, as well as to repair those already made; and that Mr Smyth ought to remove and take away the bulwark or embankment unwarrantably and illegally erected by him and his predecessors in the river and its branches, and prohibited and discharged, in all time coming, from making or constructing any bulwarks or embankments along the course of the river to the injury of the pursuers.

The action was brought before Lord Gillies, who appointed the parties to be ready to debate; but, preparatory to the hearing, defences were lodged, and after hearing parties upon the defences, the Lord Ordinary directed; that Messrs Forbes should make a special condescendence, in terms of the Act of Sederunt, of the facts they offered to prove in support of the conclusions of the summons, and,

June 28, 1825.

when lodged, appointed the same to be answered; and in the mean time he remitted to Mr Peter Brown, a surveyor, to examine the eye sketch produced by one of the parties of the river Findhorn opposite the lands of Waterford, and river and lands in question, and frame and report a sketch of the river, and the adjacent banks and encroachments complained of. My Lords, the remit to Mr Brown was recalled, and it was remitted to Mr William Cuming, surveyor, Inverness, to examine the eye sketch of the river Findhorn opposite to the lands of Waterford, and the river and lands in question, and frame and report a similar sketch of the river and adjacent banks, and so on. He gave in a plan, accompanied by a report, and his observations were considered as *ultra vires*, as undoubtedly they were, the object being to get a plan of the present respondent's lands, and the encroachments complained of.

My Lords,—A condescendence was afterwards put in, and in that condescendence they confined themselves to the circumstance of the sights and the towing-paths. In the first condescendence they said nothing at all respecting the embankment which had been made on the respondent's lands. However, my Lords, in their answers to the defender's condescendence, they expressly allege, 'that the defender is not entitled to be assoilzied from the pursuers' demand that the embankment shall be altered, for this reason, that it is so constructed as to be injurious to the fishing, particularly from preventing the fishers from passing along the banks and towing their cables—a thing, moreover, not necessary to its utility as an embankment, and this the pursuers offer to prove.' That part of the condescendence was denied by the other side, but no proof has ever been gone into as to the nature of these embankments. That is the first point. As to the second point, namely, the sights and the towing-paths, it was contended by the appellants, that although the right to make these sights and the towing-paths was not necessarily incident to the right of fishing, yet that having, in other parts of the stream, been permitted to make them, and having enjoyed them in other parts for a length of time, that gave them a right of prescription—a right to do so in every part of the stream. The Court of Session were of opinion that was not sound argument, and that the action was not maintainable; and the Court were unanimously of opinion, that the proceeding of the Sheriff was a proper proceeding.

But then, as to the embankment, the Court of Session, without any inquiry, have said, that it is not injurious to the right of fishing, and that the respondent had a right to make it, although they have gone into no proof upon the subject; which I think they should have done, with a due regard to that right which the appellant avers he has of drawing his nets upon the banks of the river, and which he is utterly precluded from doing in any manner, now this embankment is made. It was alleged also by the appellant, that the respondent had carried the embankment a considerable way into the stream, and obstructed

June 28. 1821. their right of fishing in the stream. These facts have not been inquired into at all. I cannot give any opinion whether it will turn out or not that these embankments are injurious to the right of fishing. It may turn out that they are not an injury at all; but the question is, whether your Lordships can decide that, not having the facts before you. They have alleged on the one side, that it is not an injury; and on the other side, that it is; and, without any proof, the Court have said, the embankment shall stand, although it may injure the right of fishing. Under these circumstances, although I regret very much that in this case there should be further expense and further inquiry, I do not see how it can be disposed of without remitting it to the Court of Session for further inquiry, to be obtained in the best way the Court can obtain that information. It may be that it is not a serious prejudice to the right, but when I find it is alleged that it is a prejudice, it appears to me that it would be rather unjust to the parties to determine that question without farther inquiry; and therefore I should request your Lordships to affirm all the interlocutors complained of, except in so far as in the said action of declarator the Court sustained the defence, and assolizied the defender from the conclusion of the libel respecting the bulwark or embankment erected against the said river; as to which part of the said interlocutor, remit the cause back to the Court of Session to review the same, and to inquire, in such manner as the said Court may think right, whether the said bulwark or embankment is so constructed as to be injurious to the right which the appellant has of fishing in the said river, and in a manner not necessary to its utility as a bulwark or embankment, which is the allegation made on the part of the appellants. It seems to me that justice cannot be attained in the case without inquiring, if the appellants choose to prosecute it.

Appellants' Authorities.—Lord Monymusk, July 15. and Dec. 18. 1623, (10,840. and 14,264.); Mathew, Jan. 18. 1612, (14,263.); 1. Dallas's Styles, 208.

Respondents' Authorities.—2. Ersk. 6. 15. and 1. 5.; Farquharson, June 25. 1741, (12,779.); Fairlie, Jan. 26. 1744, (12,780.); Magistrates of Aberdeen, Nov. 22. 1748, (12,787.); Trotter, July 9. 1757, (12,798.); Earl of Kinnoul, Jan. 18. 1814, (F. C.)

DUTHIE—FRASER,—Solicitors.

No. 51. WILLIAM DALGLIESH, Esq. of Scotsraig, Appellant.
JOHN DUKE OF ATHOLE, and Others, Respondents.

Interdict—Salmon Fishing.—Circumstances under which (reversing the judgment of the Court of Session) a party, who had been interdicted from fishing by stake-nets within certain bounds, was held not to have committed a breach of the interdict.

June 28. 1826.

2D DIVISION.

In 1804 the respondents, proprietors of lands on the upper banks of the river Tay, raised an action of declarator and interdict against the appellant, and others, inferior heritors, holding rights of salmon fishing both in the river Tay and in the sea, setting forth, that these inferior heritors had unlawfully made use of stake-nets, and therefore concluding, that 'it ought and should be found and declared, by decree of the Lords of Council and Session, that the said defenders have no right, by themselves, or others employed or authorized by them, to erect or use the yairs, stake-nets, or machinery aforesaid, or other machinery of the same nature, for the purpose of catching salmon or other fishes in the said river of Tay;' and for interdict 'against erecting or using in future the machinery foresaid, or other machinery of the same nature, for the purpose of catching salmon or other fishes in the said water or river of Tay, in all time hereafter.' On the 7th March 1812, the Court of Session sustained the respondents' title for having the 'yairs, stake-nets, and other machinery of the same nature removed, as having been placed within the high-water mark, for the purpose of catching salmon, or other fishes, opposite to lands bounded by the river, firth, or water of Tay, on those sides or parts where such yairs, stake-nets, or other machinery, are placed, and as far down as Drumley-sands, without prejudice to the rights of such of the defenders as have fishings in the sea; repelled the defences, and found and declared, that the defenders have no right, by themselves, or others employed by them, to erect or use yairs, stake-nets, or other machinery of the same nature, for the purpose of catching salmon, or other fishes, within the foresaid bounds; decerned and ordained the defenders to desist and cease from using the yairs, stake-nets, and other machinery complained of, and to demolish and remove the same; and prohibited and interdicted them from erecting or using in future the machinery foresaid, or other machinery of the same nature, for the purpose of catching salmon, or other fishes, within the said bounds, and decerned accordingly.' On appeal, the House of Lords ordered and adjudged, 'That the said interlocutor complained of be varied, by inserting after the words "as far down as" the words "the east end of," and by leaving out after the word "sands" the words "without prejudice to the rights of such of the defenders as have fishings in the sea." And the Lords find, that the river, firth, or water of Tay, extends at least as far down as the east end of Drumley-sands. And it is declared, that attending to the nature of the sum-

June 28. 1825.

‘mons in this cause, no judgment ought to be given in this cause
 ‘with respect to any rights of fishing claimed in the sea. And
 ‘it is further declared, that this judgment is to be without pre-
 ‘judice to any application made, or to be made, to the Court of
 ‘Session in this cause, for the purpose of ascertaining whether
 ‘the river, water, or frith of Tay, doth or doth not extend far-
 ‘ther to the eastward than Drumley-sands; and in case the
 ‘Court shall find that such river, water, or frith doth so extend,
 ‘nothing in this judgment contained is to prevent the Court
 ‘from making any such order as may be just and according to
 ‘law, touching or relating to any yairs, stake-nets, or other ma-
 ‘chinery of the same nature, within the high-water mark, placed
 ‘for the purpose of catching salmon or other fishes opposite to
 ‘any lands to the east of Drumley-sands, which shall be found
 ‘to be bounded by the said river, frith, or water of Tay. And
 ‘it is farther ordered and adjudged, that, with these variations
 ‘and declarations, the said interlocutor complained of in the
 ‘said appeal be, and the same is hereby affirmed.’ The
 case having then returned to the Court of Session, their Lord-
 ships, on the 8th July 1817, pronounced this interlocutor:—
 ‘Find, that the eastern end of the Drumley or Drumlaw-sands,
 ‘is the eastern end of the sand-bank denominated Abertay or
 ‘some of the charts referred to, lying on the southern side of the
 ‘river or frith of Tay, and as delineated and marked Abertay on
 ‘the plan in process, made by John Bell, and referred to and
 ‘signed by Mr James Jardine, civil engineer, as relative to his
 ‘report: remit to the said James Jardine to draw a straight line,
 ‘south and north, from the said eastern end of the Drumlaw or
 ‘Drumley-sands, now called Abertay, as delineated on the afore-
 ‘said plan, and mark the points where the said line intersects
 ‘the northern and southern shores: Find, that the river, frith,
 ‘or water of Tay, extends as far down as the line so to be drawn;
 ‘sustain the title of the pursuers in this action to have such yairs,
 ‘stake-nets, and other machinery of the same nature, removed,
 ‘as have been placed within the high-water mark for the purpose
 ‘of catching salmon or other fishes opposite to the lands bounded
 ‘by the river, frith, or water of Tay, as herein described, and
 ‘to be marked on the said plan; repel the defences, and find
 ‘and declare that the defenders have no right, by themselves, or
 ‘others employed by them, to erect or use yairs, stake-nets, or
 ‘other machinery of the same nature, for the purpose of catch-
 ‘ing salmon or other fishes within the aforesaid bounds as now
 ‘extended; decern and ordain the defenders to desist and

June 28. 1823.

'cease from using the yairs, stake-nets, and other machinery complained of, and to demolish and remove the same; and prohibit and discharge them from erecting or using in future the machinery aforesaid, and other machinery of the same nature, for the purpose of catching salmon or other fishes within the said bounds, and decern accordingly.' On advising a report by Mr Jardine, their Lordships, on the 21st November, 'approved of the report, and of the additions to the printed plan in process, which is subscribed by the Lord Justice-Clerk, of this date, as relative hereto: Find, that the river, frith, or water of Tay extends as far down as the line described in the petition; and that the prohibition and interdict contained in the judgment of the Court extends to all the fishings above, or to the westward of that line, and decern.'

The estate of the appellant, Mr Dalgliesh, is bounded on the north by the river, and on the east by St. Andrew's Bay, forming part of the North Sea or German Ocean. The respondents, alleging that he and his tenant, James Halliday, were engaged in fishing salmon by stake-nets within the prohibited bounds, presented a petition and complaint to the Court of Session against them for breach of interdict, and praying that they should be ordered to remove the stake-nets, and be found liable in damages and expenses. In defence they stated, that the stake-nets were placed within the tide-mark of the North Sea or German Ocean, and not within the prohibited bounds. The Court, before answer, remitted to Mr Jardine 'to visit and inspect the situation of the stake-nets complained of, and to report to the Court whether the complaint appears to him to be founded or not; and to accompany his report with a plan, shewing the exact situation of the stake-nets, with such explanations as he shall think necessary.' A report was accordingly made, which, after describing the various localities, stated, that 'in fine I am of opinion, that the stake-nets complained of are all placed within the tide-mark of the North Sea or German Ocean, and that no part of any of the stake-nets in question is placed within the tide-mark of the river or frith of Tay.' Objections were then stated by the respondents to this report, in which they contended, that it was proved by ancient documents and title-deeds, that the place where the stake-nets were erected was within the bounds pointed out by the Court, and therefore, although Mr Jardine was of a different opinion, yet it could not rule the decision of the case. Their Lordships, on the 28th June 1823, on advising the proceedings, found the ap-

June 26. 1825. **pellant** and his tenant guilty of a breach of the interdict referred to, and ordained them to remove the stake-nets; 'but in respect 'the erection appears to have proceeded from mistaken notions 'on the subject, and not from disrespect to the orders of this 'Court, found no damages or expenses due.'*

Dalgliesh appealed.

Appellant.—The judgment finding him guilty of a contempt of Court, proceeds not only without evidence, but in direct opposition to the only evidence submitted to the Court, which was in his favour. From the report and plan of Mr Jardine it is established, that the stake-nets are situated not within the river, but in the sea; and as the interdict applies only to the river, it is impossible that the appellant can be convicted of a breach of interdict. Besides, the respondents did not allege that they were erected within the river, but only 'near the mouth of the river 'or frith of Tay.'

Respondents.—The river Tay flows from the west towards the east, and the mouth or embouchure is formed by Buddenness on the north side, and Tentsmoorness on the south. The point called Buddenness extends farther towards the east, or more to the ocean, than Tentsmoorness. From the latter point a long sand-bank, called Drumley or Abertay-sands, projects and stretches across to Buddenness, and has been uniformly considered as the boundary between the sea and the river. There are several channels through it, and particularly one which is denominated the West Pool, formed by a part of the bank stretching out towards the ocean. By the judgment in the declarator, the interdict was extended to the east end of Drumley-sands, meaning, of course, the extreme outer or southern edge. But the appellant has placed his stake-nets across the channel denominated the West Pool, being within the southern side of the bank, and consequently, both according to the spirit and words of the judgment, they are within the prohibited bounds.

The House of Lords ordered, 'that the said interlocutor complained of in the said appeal be, and the same is hereby reversed, and that the petition and complaint be dismissed; but, inasmuch as the southern limits of the river, frith, or water of Tay, 'are not defined in the interlocutors pronounced upon this subject, to which the said petition and complaint bears reference, 'this judgment is to be without prejudice to the question, Whe-

* 2. Shaw and Dunlop, No. 420.

‘ther the places where the stake-nets complained of in the said June 28. 1825,
 ‘petition and complaint were put, or any of such places, be or
 ‘be not within the limits of the said river, frith, or water.’

LORD GIFFORD.—In this case it does not appear to me that the Court below ever fixed what was the southern boundary of the river or frith of Tay, or the limit betwixt it and the sea or St Andrew's Bay. If that line or boundary were once fixed, it is my opinion that Mr Dalgliesh, or his tenant, might erect his stake-nets within six inches of that boundary line,—indeed, as close to that line as possible. I do not mean to give any opinion regarding the report of Mr Jardine, who was employed by the Court of Session to report as to the facts; and it appears to me to be of little consequence whether he be correct in principle or not. It is here quite clear, that the Court of Session never fixed a south boundary, and therefore there could be no contempt. Is it possible, if this case were remitted, that any further proceedings could take place under it?

Mr Keay.—My Lord, I am afraid not.

Lord Gifford.—Then the judgment must be reversed.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

MAGISTRATES OF MONTROSE, and EWEN'S TRUSTEES, Appellants. No. 52.

ELIZABETH EWEN, Respondent.

Cause—Discharge.—Clause held (reversing the judgment of the Court of Session) to import a discharge by a daughter of all the rights competent to her as heir of provision under the postnuptial contract of her father and mother.

JOHN EWEN, a person of obscure parentage, commenced business in Aberdeen as a pedlar—then kept a stall, and latterly opened a shop there. In 1766, while his means were believed to be very scanty, he married Janet Middleton. By postnuptial contract of marriage, she conveyed to him her pro indiviso share of certain houses left by her father, and liferented by the mother; a bond for L. 100, also liferented by her mother; and her share of her father's household furniture, value, at L. 43. 7s. On the other hand, Ewen, ‘in consideration of the said marriage, and of the disposition and assignation before-written conceived in his favour, hereby, for him, his heirs, executors, and successors, and assignees, assigns, conveys, and disposes to and in favour of the said Janet Middleton, his spouse, her heirs and assignees whatsoever, in case she survive him, all and hail his whole goods, gear, merchant-ware, and effects, of whatever kind, quality, or

June 28. 1825.

1st DIVISION.
 Lord Kinnedder.

June 28. 1825. 'denomination, with all and sundry debts and sums of money
'which shall be pertaining and belonging, and resting and
'owing to him at the time of his death, whether heritable or
'moveable subjects, with power to her, immediately on his de-
'cease, to meddle and intromit therewith, and to use and dispose
'thereof at pleasure, providing always that there shall be no
'children procreate of the marriage and in life at the dissolution
'thereof; but declaring, that if there shall happen to be a child
'or children procreate of the marriage and in life at the dissolu-
'tion thereof, and that the said Janet Middleton shall survive
'him, the said John Ewen, as said is, then, and in that case, the
'general disposition before-written, conceived in her favour,
'shall be, and is hereby restricted to the just and equal half of
'the whole household furniture of every kind belonging to him
'at the time of his death, and an annuity of thirty pounds sterling
'money, which sum, in that event, the said John binds and
'obliges himself and his foresaids to pay to the said Janet Mid-
'dleton, his spouse, yearly, and each year, at two terms,' &c. be-
ginning the first payment at the first Whitsunday or Martinmas
following his decease; and obliging himself and his foresaids that
such a capital sum as will yield this annuity shall, immediately
on his death, be settled on 'good security, and the rights
'thereof taken to the said Janet Middleton in liferent, and to
'the said child or children equally in fee; and the residue of his
'whole subjects, whether heritable or moveable, shall belong to
'the said children equally: declaring hereby, that in case the
'said child or children shall afterwards die in minority, without
'lawful issue of their bodies, and during the lifetime of the said
'Janet Middleton, their mother, then the general disposition
'before-written, conceived in her favour, shall revive and return
'to its full force and effect, and she shall have the entire and free
'disposal of the whole effects and subjects, whether heritable or
'moveable, thereby conveyed, alike as if there had not been
'a child of the marriage in life at the dissolution thereof; and
'in like manner, if the said John Ewen shall survive the said
'Janet Middleton, his spouse, and there be a child or children
'of the marriage in life at the dissolution thereof, he binds and
'obliges himself to aliment, maintain, and educate the said child
'or children suitable to their station, until they are put in a way
'of doing for themselves, and that his subjects, whether herit-
'able or moveable, shall belong to them equally at his death.'
A few years afterwards Janet Middleton died, leaving one
daughter, Elizabeth, the only child of the marriage, and con-

June 28. 1825.

sequently the heir of provision under the marriage-contract. In 1787, while about twenty years of age, Elizabeth married James Grahame, about the same age, second son of William Grahame of Morphie. Her father was dissatisfied with the marriage, and James Grahame was represented as being far from an eligible husband. His portion was L. 500. In 1788 James Grahame resolved to go to India to push his fortune, and to leave his wife and an infant child at home. On the night before he set off from Aberdeen, a postnuptial contract was executed by him and his wife, and 'with the special advice and consent of her said father, and the said John Ewen for himself, his own right and interest.' The deed bears, that 'the said James Grahame intending to go abroad, where he may remain for some time in the prosecution of his affairs, he is desirous to make some suitable provision for his said spouse and family, according to his ability; and in like manner, the said John Ewen, out of his own free will, and from the regard he bears to his said son and daughter, the said parties have, with mutual advice and consent, concerted and settled upon the postnuptial contract under-written. Therefore, in pursuance thereof, the said John Ewen hath instantly, at the making hereof, satisfied and paid to the said James Grahame the sum of L. 157. 10s. sterling, as one moiety of L. 315 sterling, which he has agreed to give in name of tocher and dowry with his said daughter, of which moiety the said James Grahame and his spouse hereby grant the receipt, and discharge the said John Ewen, his heirs, executors, and successors thereof, renouncing the exception of not numerated money, and all other exceptions and objections in the contrary;' the remaining moiety of L. 157. 10s. to be paid James Grahame, his heirs, &c. on the first term of Whitsunday or Martinmas following year and day after the decease of John Ewen; 'and which whole sum of L. 315 sterling is hereby declared to be in full satisfaction to the said Mrs Elizabeth Grahame alias Ewen, and her said husband, and they do hereby accept of the same in full contentation to them of all goods, gear, debts, sums of money, and other moveables whatsoever, which they might anyways ask, claim, or crave, by and through the decease of the said Janet Middleton, her mother, by virtue of her contract of marriage with the said John Ewen, her father, or of any clause, article, or condition therein contained, which is hereby discharged to all intents and purposes, as fully and effectually as if the same was particularly engrossed, or by any other manner of way, or

June 28. 1825. 'by and through the decease of the said John Ewen, her father, ' whenever the same shall happen at the pleasure of God, either as ' bairn's part of gear, dead's third, portion natural, or on any other ' cause or account whatsoever, good-will only excepted.' Then James Grahame conveys his patrimony of L. 500 to himself and wife in liferent, whom failing, his issue, &c.; and obliges himself, during his absence, to pay the legal interest to his wife and family as a subsistence.

On 19th October 1821, two days before his death, John Ewen executed a trust-disposition, whereby he left to his daughter an annuity of L. 40 per annum, to her only son L. 525, a few small legacies to other parties, and conveyed the residue of his fortune to trustees to endow an hospital in Montrose. His property (chiefly moveable) amounted to about L. 16,000.

Thereupon Elizabeth Ewen raised an action of reduction of the postnuptial contract containing the discharge, and of the trust-disposition by John Ewen, and concluding that they should be reduced, and that she might be reponed and restored against them in integrum. This was resisted by the trustees, who alleged, that the sum given by Ewen to his daughter and son-in-law in consideration of the discharge, was fairly calculated, according to the real amount of his pecuniary finances at the date of the deed. On the other hand, it was as broadly alleged, that the amount conveyed was very far from the sum exigible by her, or which she had a fair prospect to receive under her mother's marriage-contract. It was also averred by her, that when she and her husband acceded to the deed, they were not aware of the value of her interests under it, and that every thing connected with the amount of these interests, or the contents or obligations in her mother's marriage-contract, were sedulously concealed by Ewen.

The Lord Ordinary having reported the case on informations, the Court sustained the reasons of reduction, and reduced, decerned, and declared conform to the conclusions of the libel. Thereafter (5th December 1823) they adhered, 'in ' so far as relates to the reduction of the trust-deed executed ' by the said John Ewen, as having been granted in fraudem of ' his marriage-contract with Janet Middleton; but altered, in so ' far as their interlocutor may be construed to extend to the ' reduction of the marriage-contract entered into between the ' respondent (Elizabeth Ewen) and James Grahame her husband; and find it unnecessary to reduce the said contract, in ' respect that the same does not import any discharge of the

‘rights competent to the pursuer, on the death of her father, as June 28. 1825.
 ‘heir of provision under her father and mother’s contract of
 ‘marriage, and decerned accordingly.’

Hitherto the defence had been conducted by the trustees; but the Magistrates of Montrose, the proposed administrators of the charitable endowment projected by the trust-deed, came forward, and although their petition was (15th January 1824) refused as incompetent on the merits, they were held to be sisted as defenders to the action in the terms they prayed.*

The Magistrates and trustees appealed. In the Court of Session several reasons of reduction had been discussed,—on the head of deathbed, and the extent to which the law of deathbed affects moveables,—of fraud, lesion, and culpable concealment,—of defects peculiar to the construction of the trust-deed, &c.; but the ground on which the judgment of the House of Lords proceeded was, the effect of the terms of the postnuptial contract of 1787 upon the postnuptial contract of John Ewen and Janet Middleton in 1766.

Appellants.—By the tripartite deed all claims whatever under the marriage-contract of 1766 are discharged. It is clear that was the *enixa voluntas* of parties. The discharge of the moveables is applicable *ad omnia*; and although the generality of ‘all ‘goods, gear,’ &c. be set down at the beginning of the clause applicable to the mother’s death, it must in reading be carried on to the beginning of the clause applicable to the father’s death. The words ‘either as bairn’s part,’ &c. are exigetical, were added *ex abundante*, and cannot controul or destroy the effect of the general and ample discharge imported by the previous expressions. They are merely demonstrative, not taxative. The respondent’s argument depends on not carrying forward the words ‘all goods,’ &c. and rests therefore on a false reading. Besides, the respondent discharged all claims competent ‘by ‘and through the decease of the said Janet Middleton by virtue ‘of her contract of marriage with the said John Ewen.’ But these clearly included her right as heir of provision. The claim to her mother’s share of the goods in communion (supposing her mother had not by implication discharged it) was not a claim arising under the contract of marriage, and therefore could not have been in view in discharging claims under the contract of marriage. Consequently nothing was left to be discharged.

June 28. 1825.

but her claims as heir of provision; and this provision under the contract of marriage had taken effect at the date of the tripartite deed. It was therefore the clause in the contract of marriage of 1766, vesting the right to all Ewen's subjects, whether heritable or moveable, to which the words of the discharge plainly apply. Moreover, the expressions used are sufficient to discharge the marriage-contract itself, and 'any clause, article, or condition therein contained.' The appellants have no desire to quarrel with the rule, that where a discharge is granted of certain claims particularly enumerated, the mere addition of general words will not extend the effect of it beyond the particulars, or to other claims not enumerated, for here the discharge has not been constructed in that form.

Respondent.—The Court below held, that the tripartite deed need not be reduced, as the discharge contained in it did not apply to the right to succeed as heir of provision under the marriage provision of 1766, and the tripartite deed was therefore no bar to reduce the trust settlement. Now what is the import of the tripartite deed? The respondent had a distinct and separate set of claims. One set of rights arising by and through the decease of her mother, whether created by virtue of the contract 1766 or otherwise; and the second set arising by and through the decease of her father. The rights affecting the father vested in the respondent at her birth, but were not exigible until her mother's death. The first set embraced her mother's share of the goods in communion, which was not renounced in the contract 1766, but was discharged by the tripartite deed; and the other was the respondent's right as heir of provision under the contract of 1766, to which the discharge cannot be applied, because that was not a right by and through the decease of the mother, and could not arise until the father's death; whereas the claim discharged was one (arising by her mother's death) against her father during his lifetime. The addition of the words, 'by virtue of her marriage-contract,' &c. create no sound distinction. Then comes the second set of rights emerging on her father's death. But the words used do not include a discharge of her right as heir of provision; because, 1st, If intended to be discharged, this was the appropriate place for its introduction. But the deed is silent here (as it is throughout) on that important point. And, 2d, The deed does describe the rights to be discharged, and these are all rights competent at common law, but not one of them arising *ex contractu*. The appellants try to carry forward and force in the words

introductory to the discharge of the claims at the mother's death. June 28. 1825.

That is obviously against every rule of fair interpretation, and, in a question of a child's rights, never can be admitted. But then an appeal is made to the closing expression, 'or any other clause,' &c. These general words, however, must be explained and limited by the previous particulars. That is a rule of law too firmly fixed to be now shaken. If there were any other common law right but those enumerated, the appellants might perhaps, under the general clauses, be protected as to that right; but by the form of expression adopted in the tripartite deed, such a right as that of heir of provision is as much excluded as if excluded totidem verbis. The argument founded on the words 'any clause, article, and condition' of the marriage-contract 1766, as if operating by themselves, has no support in reason or grammar. In short, had parties intended to discharge the right of provision, apt and proper words would have been introduced for that purpose. And that it was not intended, at least by the respondent, is made manifest by the whole circumstances attending the concoction of the tripartite deed, and the situation and age of herself and husband. If so, the respondent's rights under her father and mother's marriage-contract 1766 stand good, and cannot be defeated by a gratuitous deathbed deed, amounting unquestionably to an alienation in fraudem of that contract.

The House of Lords found, 'that the marriage-contract entered into between the respondent and James Grahame her husband, imports a discharge of all the rights competent to the pursuer as heir of provision under her father's and mother's contract of marriage: And it is therefore ordered and adjudged, that the interlocutors complained of, so far as they are inconsistent with this finding, be reversed: And it is further ordered, that the cause be remitted back to the Court of Session, to proceed further therein as shall be consistent with this judgment, and as shall be just.'

LORD GIFFORD.—My Lords, The only other case to which I shall now call your Lordships' attention, is one which was heard last week, the case of the trust-disponees of the late John Ewen, merchant in Aberdeen, and Mrs Elizabeth Ewen or Grahame.

My Lords,—The question in this cause, and the only question brought before your Lordships' House, is upon the construction of a supposed acquittance or discharge in the marriage-contract of Mrs Grahame,—that is the only question that now strictly can be determined by your Lordships.

June 28. 1825.

My Lords,—It appears that a person of the name of Ewen, who was originally an obscure person, stated in the papers to have been an itinerant pedlar, married, in the year 1766, a person of the name of Janet Middleton; and upon that occasion, or soon after the marriage, a post-nuptial contract was executed between the parties. It was entered into by Mrs Ewen, with the consent of her mother; and by it she, in consideration of the marriage formerly solemnized, and now subsisting between her and her husband, conveyed to him, in the first place, her pro indiviso share of the property of the houses left by her father, and which were enjoyed by her mother in liferent; she also conveyed a bond for L. 100, granted by a methodist society in Aberdeen, under the burden also of her mother's liferent; and she and her mother conveyed to Mr Ewen his wife's share of the household furniture belonging to her father. In consideration of these covenants, Mr Ewen assigned and conveyed his whole property and effects to his wife, and the children that might be born of the marriage, according to the several events of a dissolution of the marriage, by the predecease of the husband or wife respectively, and with or without issue. This clause of the deed is expressed in the following terms:—‘ And on the ‘ other part, the said John Ewen, in consideration of the said marriage, ‘ and of the disposition and assignation before-written, conceived in ‘ his favours, hereby, for him, his heirs, executors, and successors, and ‘ assignees, assigns, conveys, and disposes to and in favours of the said ‘ Janet Middleton, his spouse, her heirs and assignees whatsoever, in ‘ case she survive him, all and hail his whole goods, gear, merchant- ‘ ware, and effects, of whatever kind, quality, or denomination, with ‘ all and sundry debts and sums of money which shall be pertaining ‘ and belonging to, and resting and owing to him at the time of his ‘ death, whether heritable or moveable subjects, with power to her, ‘ immediately on his decease, to meddle and intromit therewith, and to ‘ use and dispose thereof at pleasure; providing always, that there shall ‘ be no children procreate of the marriage, and in life at the dissolu- ‘ tion thereof: but declaring always, as it is hereby specially provided ‘ and declared, that if there shall happen to be a child or children ‘ procreate of the marriage, and in life at the dissolution thereof, and ‘ that the said Janet Middleton shall survive him the said John Ewen ‘ as said is, then, and in that case, the general disposition before- ‘ written, conceived in her favour, shall be, and is hereby restricted to ‘ the just and equal half of the whole household furniture, of every ‘ kind, belonging to him at the time of his death, and an annuity of ‘ L. 30 sterling, and which sum is to be paid at certain times of the ‘ year: And in case the said John Ewen should survive the said Janet ‘ Middleton, and there be a child or children of the marriage in life ‘ at the dissolution thereof, he binds and obliges himself to maintain ‘ and educate said child or children suitable to their station, until they ‘ are put in a way of doing for themselves; and that his subjects, whe- ‘ ther heritable or moveable, shall belong to them equally at his death.’

June 28. 1826.

So that your Lordships perceive, by this marriage settlement, the whole of the property of the husband was settled on the children of that marriage, either upon the death of the husband, if he survived the wife, or if the wife survived the husband, subject to a certain annuity payable to her.

My Lords,—It appears that there was only one child born of that marriage—a daughter, who is the respondent in this appeal. She married a person of the name of Grahame; and that marriage, it is said, took effect without the consent of her father;—whether it did or not, it appears, after the marriage, a settlement was made, and upon one of the clauses of that settlement the question in this cause turns. The deed was a tripartite contract between Mrs Grahame, first, with her husband's consent; secondly, her husband; and, thirdly, her father. I should have stated, that the mother of Mrs Grahame was dead, and that she was the only child. The deed recites, 'That the parties, considering that Mr Grahame and his wife were lawfully married to each other upon a certain day in November 1787, and have lived together since that time as married persons, and that now a son is born lawfully procreated of the said marriage; and also considering that there was no contract of marriage entered into between them prior to the celebration of the marriage, and the said James Grahame intending soon to go abroad, where he may remain for some time in the prosecution of his affairs, he is desirous to make some suitable provision for his said spouse and family, according to his ability: And in like manner, the said John Ewen, out of his own free will, and from the regard he bears to his son and daughter, the said parties have, with mutual advice and consent, concerted and settled upon the postnuptial contract under-written: Therefore, in pursuance thereof, the said John Ewen hath instantly, at the making hereof, satisfied and paid to the said James Grahame the sum of L. 157. 10s. sterling, as one moiety of L. 315 sterling which he has agreed to give in name of tocher or dowry with his said daughter, of which moiety the said James Grahame and his spouse hereby grant the receipt, and discharge the said John Ewen, his heirs and executors thereof, renouncing all exceptions and objections: and John Ewen binds and obliges himself and his forebears, to satisfy and pay to James Grahame, his heirs or executors, the remaining moiety at the first term of Whitsunday or Martinmas next immediately following year and day after the decease of the said John Ewen, with a fifth part more of liquidate penalty in case of failure, and the annual rent of the said moiety during the not-payment after the term of payment thereof above-written; and which whole sum of L. 315 sterling is hereby declared to be in full satisfaction to the said Mrs Elizabeth Grahame, alias Ewen, and her said husband, and they do hereby accept of the same in full contentation to them of all goods, gear, debts, sums of money, and other moveables whatsoever, which they might any ways ask, claim or crave, by

June 28. 1825. ' and through the decease of the said Janet Middleton, her mother, ' by virtue of her contract of marriage with the said John Ewen her ' father, or of any clause, article, or condition therein contained, which ' is hereby discharged to all intents and purposes, as fully and effectually as if the same was particularly engrossed, or by any other manner of way, or by and through the decease of the said John Ewen, ' her father, whenever the same shall happen at the pleasure of God, ' either as bairn's part of gear, dead's third, portion natural, or on any ' other cause or account whatsoever, good-will only excepted.'

My Lords,—It appears that Mr Ewen, the father, survived this marriage-contract a great many years ; and it should seem that, in the latter part of his life, he became very opulent, and was possessed of many thousand pounds. It appears, that upon his deathbed he made a deed of settlement, the provisions of which it is unnecessary for me to state to your Lordships, except that he thereby provided for the payment of an annuity of L. 40 per annum, for the life of his daughter ; and after leaving various other legacies and charitable bequests, he employed the remainder of his property in endowing an hospital in Montrose.

My Lords,—After his death, Mrs Grahame instituted an action of reduction against the trust-disponees of this disposition, which, I have stated to your Lordships, was executed shortly before the death of Mr Ewen ; and by her summons she seeks for the reduction of the trust settlement, and also of her own marriage-contract—she states the marriage-contract of her mother, and that she was the only child of that marriage—she seeks to have her own marriage-contract reduced, upon the ground ' that it was obtained from her upon false ' pretences, and by gross fraud and circumvention on the part of ' her father ; and particularly, by falsely representing, as proved by ' the foressaid postnuptial contract of marriage, that he entered into ' the said postnuptial contract out of his own free will, and from the ' regard he bore to his said son and daughter, and that he had advanced the sum of L. 157. 10s. as a moiety of L. 315, which he had ' agreed to give in the name of tocher or dowry ; under which false ' and fraudulent device he elicited and impetrated, from the pursuer, a ' discharge to himself of all goods, debts, sums of money,' and so on ; ' and which discharge, (she says), was so falsely and fraudulently obtained by the pursuer, her legal guardian, sine redditis rationibus, ' and more particularly in and through the gross fraud and circumvention of the said John Ewen, seeing, at the time of the obtaining ' of the said discharge, he was in possession of property belonging ' to the pursuer in right of her deceased mother Janet Middleton.' Then she says, that the discharge was obtained on false pretences, and without any just or onerous cause, and to the pursuer's great hurt ; and, moreover, that the discharge was obtained by John Ewen while he had in his possession the contract of marriage. Then she states what that contract was, the result of that contract being,

‘ that the property of the said John Ewen and Janet Middleton was thereby settled on the children of the marriage, and any discharge obtained by the said John Ewen, whereby the foressaid contract was to be voided, was ultra vires of the said John Ewen, independent of the fraud and circumvention condescended on; therefore, and for other reasons,’ she seeks for the reduction of that instrument. Then having reduced that settlement, if she succeeds, she seeks also for a reduction of the trust-disposition, upon the ground that it was in fraud of the marriage-contract, and executed upon deathbed. I call your Lordships’ attention to this, to shew your Lordships that it was thought material by Mrs Ewen, that the marriage-contract executed by her should be reduced, to let her into a title to reduce the trust-disposition.

It appears, when the case came before the Court in January 1823, they pronounced an interlocutor, by which ‘ they sustain the reasons of reduction, and reduce, decern, and declare conform to the conclusions of the libel;’—so that they originally reduced both the deeds, both the trust-disposition and the marriage-contract. However, on it coming on again on a reclaiming petition, the Court pronounced this interlocutor:—‘ Having resumed consideration of this petition, with the additional petition given in for the petitioners, and advised the same with the answers to both petitions, they adhere to their interlocutor reclaimed against, and refuse the desire of the said petition, in so far as relates to the reduction of the trust-deed executed by the said John Ewen, as having been granted in fraudem of his marriage-contract with Janet Middleton; but alter the interlocutor reclaimed against, in so far as it may be construed to extend to the reduction of the marriage-contract entered into between the respondent and James Grahame, her husband; and find it unnecessary to reduce the said contract, in respect that the same does not import any discharge of the rights competent to the pursuer on the death of her father, as heir of provision under her father and mother’s contract of marriage; and decern and declare accordingly, but find no expenses due.’ So that your Lordships will perceive, that by this last interlocutor they recall the decision they had pronounced, by which they had reduced the marriage-contract; they think it unnecessary to proceed with that part of the action, because, upon looking at that marriage-contract, they think that the discharge which it contained did not import any discharge of the rights of the pursuer, upon the death of her father, as heir of provision; so that the single question brought before your Lordships, and which has been discussed at your Lordships’ Bar, is, whether or not the Court of Session have come to a right conclusion, in judging that that contract did not operate to discharge the rights of Mrs Grahame upon the face of it, without considering whether it was a fair transaction—without considering whether the deed could be reduced upon the grounds stated in the summons—without considering whether fraud was practised or not; but whether, assuming it was a fair trans-

June 28. 1825.

June 28. 1825.

action, whether the discharge it contained was a discharge of every thing she could demand under the marriage-contract of her mother.

My Lords,—Whatever inclination one might feel in favour of this lady, under the circumstances of this case, finding that her father has left her only a small portion of his large possessions, having left the rest to charitable purposes—whatever inclination the House might feel to coincide, as far as it could, with the construction which has been put by the Court of Session upon this settlement, yet, acting judicially, I think we are bound, and that every Judge is bound, to discard from his mind all the circumstances which might lead him away from the real question in the cause, namely, what is, upon the face of this instrument, the fair construction of the language that has been used by the parties.

At the time this instrument was executed, it appears that this gentleman, Mr Ewen, was not in very wealthy circumstances; and it is not at all improbable, that the sum he appropriated to them might be a very large portion of his property. She had married, and he agrees to give her L. 315, one-half of it to be paid down immediately, and the rest a year after his decease. I do not stay to comment upon the particular expressions of the former parts of the settlement, because at last we come to the question, of what the lady has done in the last clause of the settlement. My Lords, her mother was dead, and it is said that, strictly speaking, upon the death of her mother no right vested in her, but it was only upon the death of her father she was entitled to any claim at all. My Lords, by the death of her mother, her rights were so far ascertained, that she was the only child of the marriage, and it was impossible for the father to deprive her of any property he might be possessed of at the time of his death. She accepts it 'in full contentation of all goods, gear, debts, sums of money, and other moveables whatsoever, which she might any ways ask, claim, or crave, by and through the decease of the said Janet Middleton, her mother, by virtue of her contract of marriage with the said John Ewen, her father, or of any clause, article, or condition therein contained, which is hereby discharged to all intents and purposes, as fully and effectually as if the same was particularly engrossed, or by any other manner of way, or by and through the decease of the said John Ewen, her father, whenever the same shall happen at the pleasure of God.' Now, I really think, that a lawyer, looking at this instrument, would say, it is clear she intended to discharge every claim she had under her marriage-contract. But it is said, that although at the first view that might appear to be the construction of it, yet the words, 'by and through the decease of the said Janet Middleton, her mother,' are restricted to what she had a right to upon the death of her mother; and it is said she might have released and foregone that which her mother was entitled to. But it is quite obvious to me, that the words are sufficient to discharge every right she had under this marriage settlement, or at common law, upon her father's death. My Lords, I agree, though I do not go to the extent urged by one of

June 28. 1825.

the learned Judges, my Lord Gillies, who, feeling what he considered to be the hardship of the case, in a father giving away his property from an only child, says, 'he is not prepared to say, that considerations 'in equity should not entitle their Lordships to dispense with the 'strict rules of construction applicable to such deeds.' I should say, it is not for a Court of equity to dispense with the rules of equity, as applied to the construction of deeds, because nothing would be more dangerous than to apply feelings of commiseration or compassion to the construction of written instruments, by which the parties agree at the time to be bound. Lord Gillies states, that his whole fortune, at the time of his daughter's marriage, consisted of L. 400—it certainly amounted to nothing like what he acquired afterwards during the remainder of his long life: she accepts L. 300 from him at that time, and she releases him in as large words as she could use, from all her rights under him; and it was fairly argued, that it amounted to a relinquishment, on her part, of what she was entitled to at common law. But then, as to the words of the settlement, 'in full contentation: to them 'of all goods, sums of money, &c. which they might any ways ask or 'claim by and through the decease of her mother:' Under the decease of her mother she was not entitled to any thing; but it settled the right she would have at the death of her father; and if I was not acting in the character of a Judge—if I was not advising your Lordships as a Judge, I should feel every inclination to get rid of what is the fair legal construction of this instrument: but it does not appear to me, that I can, sitting as a Judge, judicially construing this instrument, say, that it does not import and convey a discharge of all the rights she should derive from her father. The consequence would be, that if your Lordships should concur with me in reversing these interlocutors, that will not settle the question, because the question still remains, whether the deed can be reduced upon the other grounds:—The Court at first pronounced an absolute reduction of the marriage-contract;—they afterwards recall it, and say it is unnecessary to reduce that, because, under their view of it, the discharge did not amount to a discharge of what she was entitled to under her father's marriage settlement, and therefore did not stand in the way of the trust-disposition. But I apprehend, upon that ground, what Lord Gillies says is correct, that there was a complete discharge; but if it should appear the deed was unfair, they ought to reduce it. I apprehend that question is still open. At first the Court decided the question in favour of the respondent; but I apprehend, by recalling it, they have left that still open. I apprehend that what your Lordships would have to do in this case would be, to pronounce a finding, that this deed, upon the face of it, does import a discharge; and, upon that finding, remit it to the Court of Session to proceed further in the action of reduction as they think just. The case may then proceed upon those allegations in the summons, as to the fraud, and so forth, practised upon this lady, and she will still have an opportunity of making out, if she can, that it was so improperly obtained;—and

June 28. 1825. although it does bear upon the face of it a discharge of the marriage settlement, still, if it was obtained from her by fraud, it ought to be set aside. But I must confess, that I can offer to your Lordships no other advice upon the present question, but that the interlocutor should be reversed; because I think, for the reasons I have given, that the deed is a discharge of the rights under her mother's marriage-contract. The judgment of your Lordships will be, to reverse the finding, and remit the case back to the Court of Session, to proceed further upon it as they may think advisable.

Appellants' Authority.—Todd, Dec. 12. 1770.

Respondent's Authorities.—1. Stair, 18. 2.; 3. Ersk. 4. 9.; Swan, June 17. 1620, (5038.); Weems, July 24. 1706, (912.); Gordon, Dec. 25. 1702, (5050.); Monro, Dec. 16. 1712, (5052.); Anderson, Nov. 22. 1743, (5054.); Hepburn, June 24. 1785, (5056.); Fife, Nov. 29. 1751; Nisbett, Jan. 18. 1796, (8181.); Sinclair, July 29. 1768, (8186.); Irvine, Dec. 15. 1744, (2304.); Maxwell, Feb. 1722, (3194.)

DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 53.

JAMES DUNCAN, Appellant.

HIS MAJESTY'S ADVOCATE, Respondent.

Jurisdiction—Fraudulent Bankruptcy—Stat. 1701, c. 6.—Wrongous Imprisonment.—Held, (affirming the judgment of the Court of Session), 1. That under the Act 1696, c. 6. the Court of Session has jurisdiction, exclusive of the Court of Justiciary, as to fraudulent bankruptcy; 2. That although a party was imprisoned on a charge of fraud and fraudulent bankruptcy by a warrant of the Court of Justiciary, yet that letters of intimation under the Act 1701, c. 6. from that Court were unavailing to the effect of getting liberation from imprisonment under a charge of fraudulent bankruptcy; and, 3. Question raised as to whether the Act 1701, c. 6. applied to proceedings before the Court of Session, and the finding of that Court in the negative superseded.

June 28. 1825.

1st DIVISION.

ON the 12th of August 1822 the Lord Advocate presented a petition to the High Court of Justiciary against James Duncan, grocer and spirit-dealer in Leith, praying for warrant to incarcerate him in the tolbooth of Edinburgh, 'as guilty of fraud and fraudulent bankruptcy, till liberated in due course of law;' and warrant was upon the same day granted accordingly, in virtue of which he was imprisoned in the jail of Edinburgh. On the 14th Duncan applied to the Court of Justiciary for letters of intimation, in terms of the statute 1701, cap. 6. which were issued and served on the Lord Advocate on the 16th. On the 12th of October the Lord Advocate presented a petition and

June 28. 1828.

complaint to the Lords of Council and Session, and the Lord Ordinary on the Bills, charging Duncan with fraudulent bankruptcy, and praying for warrant of service. This was granted by Lord Cringletie, as Ordinary upon the Bills, on the 14th, and Duncan was ordained to lodge answers by the 12th of November. This warrant having been served, and the sixty days having expired upon the 15th of October, Duncan on the following day, being the 16th, applied for liberation to the Court of Justiciary in terms of the statute. This was refused on the 18th by Lord Meadowbank, in respect of the petition and complaint to the Court of Session. No answers having been lodged, the Court of Session, on the 13th of November, granted warrant to bring Duncan to the Bar on the following day, which was accordingly done, and answers were thereafter lodged by him. Thereafter, on the 28th, Duncan, alleging that his trial had not been brought to a conclusion within thirty days, in terms of the statute 1701, presented a petition to the Court of Session to be discharged. This gave rise to two questions: 1st, Whether the Act 1701 was applicable to proceedings before the Court of Session, and particularly relative to fraudulent bankruptcy? and, 2d, Supposing that it was, whether the letters of intimation from the Court of Justiciary were available in relation to a charge of fraudulent bankruptcy? which, again, gave rise to the question, whether the Court of Session had an exclusive jurisdiction in regard to such a crime? The Court, on the 21st January 1828, after a hearing in presence, found, ‘that the provisions ‘of the Act of Parliament 1701, cap. 6. do not apply to cases of ‘fraudulent bankruptcy, which are cognizable only in the Court ‘of Session, and therefore refused the petition.’*

Duncan appealed, and both the above questions were fully argued: but as that relative to the Act 1701 was superseded by the judgment of the House of Lords; and the other, in regard to the Court of Session having a jurisdiction exclusive of the Court of Justiciary, has been regulated by the 7. and 8. Geo. IV. cap. 20. declaring that the Court of Justiciary shall be competent to try the offence; it is unnecessary to give any detail of the argument, or of the proceedings, which are fully set forth in the speech of Lord Gifford.

The House of Lords ordered and adjudged, ‘that the said

* See 2. Shaw and Dunlop, No. 189.

June 24. 1825. 'interlocutors complained of be affirmed, without reference to the special finding in the last interlocutor, as to which the Lords, viewing all the circumstances, do not think it necessary to come to any determination.'

LORD GIFFORD.—I will call your Lordships' attention to a case, in which James Duncan is the appellant, and Sir William Rae, the Lord Advocate of Scotland, is the respondent. My Lords, the question raised upon this appeal is, whether the appellant was properly detained in custody by an interlocutor of the Court of Session, having reference to the application of the Act of 1701, chapter 6?

My Lords,—It will be necessary to draw your Lordships' attention to the circumstances out of which the question arises, and the whole of the proceedings which have taken place in the Court of Session and the Court of Justiciary. It appears that the appellant, who formerly carried on trade in Scotland, having become a bankrupt, a charge was preferred against him of fraud. Upon the 12th of August, in the year 1822, a petition was presented to the High Court of Justiciary, in the name of his Majesty's Advocate, which prayed for a warrant to incarcerate the appellant in the tolbooth of Edinburgh, as guilty of fraud and fraudulent bankruptcy, till liberated in due course of law. In consequence of that petition a warrant was issued, bearing date the 12th of August (the same day), granted by the Lord Justice-Clerk, and the appellant was, by virtue of that warrant, removed from the tolbooth of the Abbey of Holyrood-House to that of the city of Edinburgh, in which he has been ever since confined.

My Lords,—The appellant being thus imprisoned, he immediately applied, in terms of the 6th Act of the first Parliament of King William, for letters of intimation, calling on his Majesty's Advocate to fix a diet for his trial within sixty days. That was a proceeding which he was authorized to take under the Wrongous Imprisonment Act; and the effect of that proceeding, as it must be in your Lordships' recollection, was to force on the prosecutor to a trial, or to fix a trial within sixty days. My Lords, letters of intimation were accordingly ordered by the Lord Pitmilley to be issued on the 14th of August 1822, and they were regularly served on his Majesty's Advocate on the 16th of the same month of August. Now, your Lordships understand, that, supposing the appellant was regularly proceeding, the diet being to be fixed within sixty days from the service of the letters of intimation, those sixty days would expire on the 15th day of October.

After these letters of intimation had been thus served, it was discovered by the prosecutors that they had taken a wrong course of proceeding; at least that was their impression; for that the offence with which they wished to charge the appellant, that of fraudulent bankruptcy, being an offence, as they conceived, created by a statute which passed so long ago as the year 1696, under that statute the cognizance of that offence was intrusted solely to the Court of

Session: this, I say, being discovered on the part of the prosecutors, they, on the 12th of October, three days before the expiry of the sixty days of the letters of intimation, preferred a petition and complaint to the Court of Session; which petition and complaint proceeded entirely upon the charge against the appellant of having been guilty of fraudulent bankruptcy, within the intent and meaning of that statute passed in the year 1696. The petition and complaint began with a short recital of that Act, and then of the facts which were alleged against the appellant, and which were supposed to bring him within the provision of that Act; and then the prayer of that petition was, that the Lords of Session should grant warrant for serving this petition and complaint upon the said James Duncan, and ordain him to put in answers thereto on the 12th day of November next, or on such other day as their Lordships should judge proper; and thereafter, on resuming consideration thereof, to inflict on the said James Duncan such punishment as their Lordships should deem adequate to his offence; and in the mean time to grant warrant for detaining him in the jail of Edinburgh until liberated in due course of law.

In consequence of that petition and complaint, the Lord Ordinary, Lord Cringletie, before whom it was heard, pronounced an interlocutor on the 14th of October 1822; in which he stated this:—‘Having considered this petition, grants warrant for serving the same, with a copy of this deliverance, upon the said James Duncan, and appoints him to put in answers thereto on the 12th day of November next; and ordains this petition and complaint to be boxed to the Court, with or without answers, on that day.’

My Lords,—The appellant Mr Duncan conceiving, that at the expiration of the sixty days, which terminated on the 15th of October, no diet having been fixed for the trial on the original charge before the High Court of Justiciary, he was entitled to his discharge, he, on the 16th of October, presented a petition to the Court of Justiciary for his discharge. That petition for liberation, which had been presented to the High Court of Justiciary, came to be advised by the Lord Meadowbank, one of the Lords of Justiciary, who pronounced an interlocutor refusing the desire of the petition, ‘in respect of the petition and complaint presented by his Majesty’s Advocate to the Court of Session, and the deliverance thereon by the Lord Ordinary on the Bills; and also, in respect that it is to be inferred from the terms of the Act 1696, cap. 5., and is laid down by the authorities in point of law, that the crime with which the petitioner stands charged, and for which the warrant on which he is incarcerated was granted, is only cognizable by the Court of Session, and not by the Court of Justiciary; reserving to the petitioner, if so advised, to apply for liberation to the Court of Session, or Lord Ordinary on the Bills.’

Now, your Lordships perceive, that the effect of this interlocutor pronounced by Lord Meadowbank is, that in as much as he considered that the crime of which the petitioner stood charged, and for which

June 28. 1825. the warrant on which he was incarcerated was granted, was only cognizable by the Court of Session, he was not authorized to discharge him at the time when this petition of liberation was presented. My Lords, there has been no question in this cause, whether or not my Lord Meadowbank, or the Court of Justiciary, were bound, at the time this petition of liberation was presented, to have granted to the appellant the liberation, so far as the warrant for incarcerating him from the Court of Justiciary was concerned, he being to receive his discharge from the Court of Session: the effect of the decision of Lord Meadowbank was, perhaps, that the case was considered as being in the Court of Session.

The matter was brought before the Court of Session on the 13th of November. It appeared that the appellant had not thought fit to obey the order pronounced by the Lord Ordinary on the Bills, ordaining him to put in answers to the petition and complaint. On the 13th of November the matter was moved in the First Division of the Court, and then this interlocutor was pronounced: 'The Lords having considered this petition and complaint, and no answers having been given in thereto, grant warrants at the petitioner's instance, in terms of the prayer of the petition to the Magistrates of Edinburgh, and keepers of their tolbooth, wherein the said James Duncan is presently incarcerated, to keep and detain the person of the said James Duncan in prison until he shall be liberated in due course of law; and further, appoint the said James Duncan to appear at the Bar of this Court to-morrow at ten o'clock, and grant warrant to messengers of Court, or messengers at arms, to receive the said James Duncan from the tolbooth and produce him in Court accordingly; and dispense with the minute-book.'

My Lords,—It appears that on the following day Mr Duncan appeared at the Bar of the Court of Session, when he applied to be admitted to the benefit of the poor's roll, and to have Counsel assigned to him. This of course led to an extension of the time for giving his answer to the petition and complaint. The Court, upon that occasion, pronounced this interlocutor: 'The Lords having resumed the consideration of this petition, with the note given in for the said James Duncan, who appeared at the Bar in terms of the deliverance of the Court of yesterday, in respect of the circumstances of the case they admit the said James Duncan to the benefit of the poor's roll, so far as regards the question at issue; appoint Messrs Francis Jeffrey and James Allan Maconochie, advocates, to act as Counsel for the said James Duncan, and Robert Playfair, solicitor, to act as agent in conducting and carrying on his defence; and farther, ordain answers to the complaint to be given in, printed, and put into the boxes, within ten days from this date, and direct the said James Duncan to be carried back from the Bar to the prison.' The appellant accordingly gave in answers to the petition and complaint, in which, while he denied the whole of the facts alleged against him, he maintained that they

June 28. 1825.

were not set forth with that minuteness and precision requisite in a criminal charge, and that the facts, even if proved, did not amount to the crime of fraudulent bankruptcy. On these points no judgment has been pronounced by the Court below, the case having been superseded by the Court of Session till the issue of the present appeal.

In the mean time, the period of thirty days, to which I am about to call your Lordships' attention, within which, as the appellant contends, the trial against him ought to have taken place, had expired; for the thirty days expired on the 13th of November, the day before that on which he appeared at the Bar of the Court, and prayed to have Counsel assigned him: however, my Lords, he applied on the 28th of November 1822 to the Court of Session by petition, praying their Lordships, 'in terms of the statute 1701, cap. 6., within twenty-four hours to issue out letters or precepts direct to messengers, for charging the Magistrates of Edinburgh, or keepers of their tolbooth, for setting the petitioner at liberty, under the penalty of wrongous imprisonment.' The Court, being of opinion that the point mooted was one of great importance, were desirous that it should be considered with greater deliberation than the short period of twenty-four hours specified in the statute admitted of. Accordingly, a minute on behalf of the appellant was given in by his Counsel, consenting to the final deliverance on the petition being delayed for such reasonable period as the Court might deem necessary for the due consideration of its merits, without losing sight of its urgency, and the summary decision to which it is entitled. The Court pronounced an interlocutor, on the 29th November 1822, in these terms:—'The Lords having considered this petition, with the minute of consent by the petitioner's Counsel, in respect thereof appoint the petition to be seen and answered by his Majesty's Advocate, the answers to be printed and put into the boxes within eight days from this date, under an amand of forty shillings sterling.' Answers were accordingly given in on behalf of the respondent, and the case was appointed to be argued at the Bar before their Lordships in the month of December; and on the 23d of January an interlocutor in these terms was signed:—'The Lords having resumed consideration of this petition, and advised the same with the answers thereto, and having heard Counsel for the parties in their own presence, they find, that the provisions of the Act of Parliament 1701, cap. 6. do not apply to cases of fraudulent bankruptcy, which are cognizable only in the Court of Session; therefore refuse the desire of this petition, and decern;' and, my Lords, as I have stated to your Lordships, from this interlocutor the appeal has been brought.

Before I again call your Lordships' attention to the facts of this case, I would just advert to the provisions of the Wrongous Imprisonment Act, as they apply to this part of the case. After directing with respect to the warrants, and so on, the statute goes on, 'His Majesty, with advice and consent foressaid, further statutes and ordains, that, upon application of any prisoner for custody in order to trial,

June 28. 1825. ' whether for capital or bailable crimes, to any of the Lords of Justiciary, or other Judge or judicatory competent for judging the crime or offence for which he is imprisoned, and the said prisoner his producing the said double of the warrant of his imprisonment under the keeper's hands, the said Judge or judicatory competent, under the pain of wrothgous imprisonment, are hereby ordained, within twenty-four hours after the said application and petition is presented to him or them, to give out letters or precepts direct to messengers, for intimating to his Majesty's Advocate or Procurator-fiscal, and the party appearing by the warrant to be concerned, if any be within the kingdom, to fix a diet for the trial within sixty days after the intimation, certifying his Majesty's Advocate and Procurator-fiscal, and the said party concerned, that if they fail the prisoner shall be discharged and set at liberty without delay; for doing whereof, the said Judge or judicatory competent are hereby expressly warranted, and strictly required and ordained to do the same, under the penalty foresaid, unless the delay be upon the prisoner's petition or desire. And the diet of trial being prefixed, the Magistrates of the place, or keeper of the prison, shall then be obliged to deliver the prisoner to a sufficient guard, to be provided by the Judge, his Majesty's Advocate, or Procurator-fiscal, that the prisoner may be assisted before the Judge competent; and his Majesty's Advocate or Procurator-fiscal, shall assist in the libel, and the Judge put the same to a trial, and the same shall be determined by a final sentence within forty days, if before the Lords of Justiciary, and thirty days if before any other Judge.'

Now, my Lords, according to the facts of this case, the first charge against this appellant, and the warrant upon it, as I have stated to your Lordships, occurred on the 12th of August 1822. That warrant issued from the Court of Justiciary, and it charged the appellant with fraud and fraudulent bankruptcy. My Lords, letters of intimation were accordingly, as I have stated to your Lordships, granted by the Court of Justiciary on the 14th of August 1822, and were regularly served on the Lord Advocate on the 16th of August. Now, with respect to the sixty days, therefore, from the letters of intimation, the warrant expired on the 15th of October; but, in the mean time, a new charge was preferred—when I say a new charge, I should rather say, a charge of the same nature as the original charge, but before a different tribunal—namely, before the Court of Session, and that charge was preferred on the 14th of October 1822. Now I think I may represent the question, whether or not the Court was competent, as depending upon the question, how far the previous letters of intimation could be applied to that charge preferred on the 14th of October 1822? and another question occurs in this case, which does not seem to have been adverted to, or reasoned upon in the Court below, whether it was competent for this appellant, after having himself acquiesced in the competence of that second charge, by asking further time to give in his answer on that petition and complaint, which farther time extended

beyond the time at which he says he ought to have been liberated;— June 28. 1825.
 whether, I say, it was competent for him to complain after that, as he has done, that he was not brought to trial sooner, that petition having been preferred on the 14th October 1822? However, certainly, we find the decision did not turn upon any such point; and I only mention these as points which might be deserving of very serious consideration. The questions which were discussed in this cause were three: First, Whether the offence of fraudulent bankruptcy under the statute of 1696, (for which offence, and for which offence only, this charge in the Court of Session was preferred), was cognizable solely by the Court of Session—whether the Court of Session had, according to the language used in this paper, an exclusive jurisdiction with reference to that offence? The next question was, Whether, after the letters of intimation obtained from the Court of Justiciary, the Court were, in that view of the case, competent to try the offence? The third question—certainly a much larger question, and one of greater importance—was, Whether the provisions of the Wrongous Imprisonment Act apply at all to criminal proceedings in the Court of Session? My Lords, upon all those questions a difference of opinion appears to have prevailed among the members of the Court of Session. A very elaborate opinion was given by both those who were in favour of the interlocutor and those against it. The first question to be considered is with respect to the nature of this offence of fraudulent bankruptcy under that statute of 1696? It was admitted in the argument, that the Court of Justiciary in Scotland has jurisdiction, generally speaking, over all offences; and therefore, if any offence was created by statute, though the same statute advanced nothing on the subject of jurisdiction, the Court of Justiciary would have cognizance. But it was contended on the other side, that where the statute creates a new offence, and at the same time gives jurisdiction to a particular Court, and directs that that particular Court shall judge of the punishment to be inflicted for that offence; in that case, (which they contended was the present), that Court, to which jurisdiction is given by the Act of Parliament, is the Court alone in which that jurisdiction lies, or that offence can be taken cognizance of, or adjudicated upon.

Now, my Lords, I will beg to call your attention to the Act of 1696. It is an Act to declare the law with respect to bankruptcy. The first part of the statute contains enactments as to those acts which shall be considered proofs of bankruptcy—and then it goes on, ‘And, lastly, His Majesty, and the Estates in Parliament, do hereby statute and ordain, that if any person shall hereafter defraud his creditors, and be found, by sentence of the Lords, to be a fraudulent bankrupt,—‘Lords’ here, meaning the Lords of Session,—‘the degree of his fraud shall also be determined by the same sentence, and the person guilty not only held to be infamous infamous juris, but also be by them punished by banishment or otherwise, (death excepted), as they shall see cause.’

June 28. 1696.

Now, my Lords, looking at the language of this statute, when you see that a discretion is placed in the Court respecting the degree of punishment which shall be inflicted on the party who is adjudged a fraudulent bankrupt; and when you find that the sentence by which the party is thus adjudged a fraudulent bankrupt, is to be a sentence of the Court of Session, in whom this discretion is vested; I must confess, upon considering this statute and the language of it, for my own part, it does appear to me that it was intended by this statute, that as far as this specific sentence was concerned, namely, declaring a man a fraudulent bankrupt within the meaning of this Act, the jurisdiction should be given to the Lords of Session, and can be exercised by no other. My Lords, I say that is my opinion, looking at the statute of 1696.

But then we come to consider, how this statute has been considered in practice in Scotland from that period to the present. It was admitted at the Bar, and is admitted in these papers, that no instance has ever occurred of a prosecution for this offence under the statute of 1696 (and I beg to impress that upon your Lordships' minds) having been preferred in the Court of Justiciary, while, on the other hand, frequent instances have occurred of men being accused of fraudulent bankruptcy before the Court of Session, and the Court of Session having adjudged upon them.

What say their institutional writers upon the subject? Why, my Lords, an authority to which reference is frequently made at your Lordships' Bar and in the Court below, I mean the authority of my Lord Bankton, says, that the offence is statutory, and that the Court of Session alone is competent to punish the fraudulent bankrupt. That is in Bankton, book i. tit. 10. par. 122., (which is referred to in the respondent's case): he considers the offence as statutory, and that the Court of Session alone is competent to punish the fraudulent bankrupt.

Mr Erskine delivers the same opinion in book iv. tit. 4. sect. 79. He says, 'Fraudulent bankruptcy may be accounted a particular kind of 'stellionate, the cognizance of which is by special statute, 1696, cap. 5. 'appropriated to the Session, who may inflict any punishment upon the 'offender that shall to them appear proportioned to his guilt, death excepted.' And, my Lords, in his smaller work, in his Principles, to which I have referred to see in what manner he states the proposition there, it is stated perhaps rather more strongly; for there he says, book iv. tit. 4. sect. 41. 'That the cognizance of fraudulent bankruptcy is exclusively in the Court of Session, who may inflict any 'punishment on the offender that appears proportioned to his offence, 'death excepted.' My Lords, Baron Hume in his Commentaries states the same proposition; so that your Lordships find not only the absence of any prosecution from the time of the statute in the Court of Justiciary, which absence corroborates the construction of that statute, but you have the opinion of the institutional writers upon the subject,

and the fact that this crime has been taken cognizance of by the Court of Session. I cannot, therefore, help concurring in the opinion of the Judges of the Court below, who were of opinion that the Court of Session had exclusive jurisdiction over the offence stated in this petition and complaint. I have all along stated, (and your Lordships will keep this in view), that this petition and complaint proceeds upon the statute of 1696. June 28. 1825.

My Lords,—If the Court of Session had an exclusive jurisdiction over this offence, then the next question is, Were the letters of intimation properly issued from the Court of Justiciary? The language of the statute of 1701 is, ‘that upon application of any prisoner for custody in order to trial, whether for capital or bailable crimes, to any of the Lords of Justiciary, or other Judge or judicatory competent for judging the crime or offence for which he is imprisoned.’ Now, I apprehend it is quite clear it was intended by this statute, that the Court granting the letters of intimation should, in the language of the statute, be competent to try the offence; and it would be singular if it were not so. A case is referred to in these papers—a case to be found in Baron Hume’s work, that of Spittal—it was with respect to an inferior jurisdiction. There the application was to the Sheriff of the county; and it was held that he was not competent to try the offence, and therefore it was held that the letters of intimation were improperly issued. The case is stated in a note in Hume, vol. ii. p. 98. He says, ‘Effect was accordingly given to that limitation in the trial (27th of November 1809) of Robert Spittal for robbery. It was objected in bar of trial, that it had not been brought on in due time after intimation made under the Act to the procurator-fiscal of Perthshire, the pannel being a prisoner in the gaol of Perth. Mr Solicitor General answers, that in this case no letters of intimation had either been applied for or granted by any Judge competent to issue the same, in terms of the Act of Parliament referred to. The Act 1701 allows a person for trial to apply to a Judge competent to the trial of the offence for letters of intimation. But in this case the pannel was imprisoned for trial for the offence of robbing Andrew Harley near to Carubrae, in the county of Kinross; yet the pretended application for letters of intimation was made to the Sheriff of Perth, who was competent neither to the trial of robbery, nor to that of an offence committed in Kinross-shire. The Lords find the intimation irregular, and therefore repel the objection stated in bar of trial.’

Undoubtedly there the application was made to the Sheriff, who had no competent jurisdiction to try the offence; but here the principle is equally applicable, because if jurisdiction with respect to the offence of fraudulent bankruptcy under the statute of 1696 is confined to the Court of Session, it seems to be equally incompetent to the Court of Justiciary to grant letters of intimation to controul the proceedings to take place in another Court of ordinary, if not superior jurisdiction; and

June 28. 1825. therefore, supposing the letters of intimation in this case might have been sufficient, if applied for to a Court of competent jurisdiction at the time they were applied for, and to have been compulsory on the Lord Advocate to fix the diet for trial—I say, assuming that—for, at the time the letters of intimation were applied for, the party was in custody, not under a warrant from the Court of Session, but from the Court of Justiciary on a charge preferred there, but which it was afterwards found it was not competent for the party to prefer in that Court, though being preferred, it was competent for the party to apply under the statute of 1701 to that Court; but finding their mistake, they subsequently preferred another petition and complaint before the Court of Session,—I say, assuming that, under these circumstances, letters of intimation could have been applied for to the Court of Session when they were applied for to the Court of Justiciary, still it appears to me, the letters of intimation having issued from the Court of Justiciary, they have issued from a Court not competent to grant them within the statute of 1701, and that therefore those letters of intimation could have no effect.

My Lords,—These grounds are fully sufficient for your Lordships to sustain the interdict which has been pronounced; and being so, I apprehend your Lordships will not feel it necessary to go beyond that which is necessary for the determination of the particular case. My Lords, I mention this, because the other, which is a very important question, perhaps the most important, if it fairly arises, is, Whether the Wrongous Imprisonment Act can be applicable to this proceeding? Whenever this question shall come fairly before your Lordships, and is necessarily to be decided, it will be of the greatest importance to attend not only to the language of the statute of 1701, but, I apprehend, also to the course of decisions which has taken place since the statute was passed; because, my Lords, although I am perfectly willing to concede, that if the statute be, in its enactments, clear and express, perhaps no continued chain of decisions upon the construction of that statute would bind your Lordships, where you clearly see that those decisions are at variance with the express clear language of it; yet, in a case which does not appear to be so perfectly clear, I should submit to your Lordships, that, in deciding what is the law of Scotland, (the same as with respect to the law of England), you would consider the opinions of Judges, sitting from time to time on the construction of that Act of Parliament, as deserving of attention, and therefore would consider, as entitled to great weight, the decisions which have taken place: and I would mention this fact, which cannot be denied, that several cases have occurred since the statute 1701, in which the Court below has been of opinion, that the provisions of the statute of 1701 were not, and could not be applicable to the decision of the Court of Session. Your Lordships are perfectly aware, that though the Court of Session is a Court for the adjudication of civil

rights between party and party, there are cases besides that of fraudulent bankruptcy with which it has an exclusive jurisdiction, or in which it has a concurrent jurisdiction with the Court of Justiciary. June 22, 1822.

On the one hand, it is said that the statute of 1701, an Act highly valued in the law of Scotland, and justly so, because its provisions, though not analogous to our Habeas Corpus Act, were intended to confer privileges of the same nature on the lieges of Scotland, and to enable them to relieve themselves from false imprisonment, or to prevent delay in their being brought to trial; whilst that statute, in its enactments, is very clear, and might therefore be intended to apply to all proceedings, whether before the Court of Session or the Court of Justiciary, yet, when you come to consider this Act, and how it is to be applied to the mode of proceeding in the Court of Session, the cases which have been decided upon that subject seem to be of great importance in enabling your Lordships finally to determine, if you should be ever called upon so to do, whether the Wrongful Imprisonment Act can be applied to the proceedings of the Court of Session, or whether, if it cannot be so applied, the subject is not entitled to the benefit which it is intended should be conferred upon it by that Act of Parliament. But, my Lords, it is my opinion, that by the form of proceeding adopted, the offence for which the party was proceeded against was cognizable under that Act of Parliament solely in the Court of Session; and that that being so, letters of intimation ought to have been applied for, and ought to have been obtained from the Court of Session; and that not having been so, the party had not brought himself within the terms of the Act of Parliament, and was not entitled, therefore, to call upon the Court of Session. We have nothing to do in the present appeal with whether he was entitled to be discharged from the warrant in the Court of Justiciary, which probably was intended to be the effect of Lord Meadowbank's interlocutor. The question is, Whether, at the time he preferred that petition to the Court of Session to be discharged from the warrant issued by the Court of Session, he had at that time, by letters of intimation issued by the Court of Justiciary, brought himself within the terms of this Act of Parliament, and entitled to call upon the Court to discharge him. For the reasons I have ventured to submit to your Lordships, it appears to me he was not at the time so entitled,—that the offence with which he was chargeable as a fraudulent bankrupt was cognizable only by the Court of Session, and that the letters of intimation ought not to have issued from that Court. The other point to which I have adverted in my introductory observations on this case, I think also entitled to serious consideration. My Lords, upon those two grounds, it appears to me the interlocutor which has been pronounced by the Court of Session, in substance refusing the desire of the petitioner, and decerning, is an interlocutor to which your Lordships will adhere; but inasmuch as I have not called upon your Lordships to pronounce a decision upon that very important question, (since it is unnecessary

June 28, 1825. in this case), whether the provisions of the statute of 1701 do apply to the Court of Session or not, I think it would be right, lest it should be conceived that the decision which may be made has rested upon that ground, that some words should be introduced to guard against that inference. I will therefore take care, in the form of the judgment I shall propose to your Lordships to pronounce upon this case, that your Lordships shall not, by affirming this interlocutor, be supposed to affirm that general proposition, which may be supposed to be included in the interlocutor as pronounced. They say, 'The Lords having resumed consideration of this petition, and advised the same with the answers thereto, and having heard Counsel for the parties in their own presence, they find that the provisions of the Act of Parliament 1701, c. 6. do not apply to cases of fraudulent bankruptcy, which are cognizable only in the Court of Session;' from whence it might be supposed, that they meant to decide this solely on the ground that the provisions of the statute of 1701 do not apply to the Court of Session. My Lords, the other ground argued upon, but not expressly decided by the Judges in the Court below, appears to me to be quite sufficient to justify the interlocutor which has been pronounced; and therefore I would propose to affirm this judgment, at the same time taking care to introduce some words to shew that this case has not been decided upon that ground.

Appellant's Authorities.—Stat. 1555, cap. 47.; 1581, cap. 118.; 2 Hume, 32, 37, 38.; Kilk. 316.; 2 Mackenzie, p. 5.; Blackstone, b. 1. § 3.; 1. Hume, 502.; Burnet, p. 167. 380.

Respondent's Authorities.—2 Hume, 37.; 1696, cap. 5.; 1. Bank. 10. 122.; 4 Ersk. 4. 79.; 1. Hume, 503.; 2 Hume, 98.; Burnet, 355.; 4. Ersk. 4. 85.; 2 Hume, 107.; Burnet, 380.; Rodger, Feb. 4. 1737, (Elchies, Wrong. Imp. No. 3.); Kerr, Nov. 22. 1744, (No. 8. Ib. and 7419.); Stark, July 29. 1748, (3442.); Cameron, Aug. 9. 1754.

— A. MUNDELL, —Solicitors.

No. 54.

EARL OF BREADALBANE AND HOLLAND, Appellant.

CLAUD RUSSELL, (CAMPBELL'S Trustee), Respondent.

Assignment in Security—Lease.—Two parties being joint tenants of certain quarries, and sole partners of a company for working them; and one of them having become the landlord, and advanced a sum of money for the other, who, in security, granted an assignation of his share in the concern; and there being no publication of this deed, or express intimation to the manager of the quarries, till within sixty days of the granter's bankruptcy; and the Court of Session having found, in a question with his creditors, that the assignee had acquired no preference;—The House of Lords remitted to take the opinions of all the Judges.

IN 1748 the late Earl of Breadalbane, proprietor of the lands and barony of Nether Lorn, and of the island of Easdale, in Argyllshire, granted two leases, one of the marble and slate rocks of the whole estate, and the other of Easdale, in favour of certain persons, who had formed themselves into a company under the name of the Easdale Slate Company, for a period which, by a subsequent prorogation, extended to 1841. Among other partners were Colin Campbell of Carwhin, the father of the appellant, and John Campbell, father of John Campbell, writer to the signet, the constituent of the respondent Mr Russell. Their fathers, in 1754, became the sole partners and tenants, and on their deaths were succeeded by their respective sons. In 1782 the appellant, on the death of his cousin the late Earl, succeeded to the honours and estate of Breadalbane, and thereby became proprietor of the quarries. His copartner, Mr Campbell, resided in Edinburgh, where he practised as a law-agent and conveyancer, acted as factor and cashier for his Lordship, received the bills and proceeds of the quarries, kept the books, and accounted to the Earl for his share; while the active operations were carried on at the quarries by means of a manager or overseer. In March 1813 Mr Campbell obtained for his accommodation two bills accepted by the appellant, one for L. 5000, and the other L. 1000, payable twelve months after date, for which Mr Campbell granted a letter of relief; and in June thereafter he executed an *ex facie* absolute assignation of his share of the Easdale quarries in favour of the appellant, under the exception of a previous assignation granted to his wife in security of her jointure in the event of her surviving him. On the other hand, the appellant granted to Mr Campbell a back-bond, declaring that he held the assignation for his own relief; and thereupon it was deposited in his charter-room at Taymouth. No intimation, however, was made of this assignation to the manager, nor did any change in possession at this time take place. On the contrary, it appeared from the books that the accounts were kept in the same form as they had been prior to the assignation,—the one-half of the profits being allotted to the appellant, and the other to Mr Campbell. The accounts so kept were docquetted by the parties on the 21st February 1816. After several renewals the appellant was obliged to retire the bill for L. 5000 to the extent of L. 2000. In 1816 he went to the Continent, and did not return till April 1818, when, finding that there was a balance of rents of L. 10,000 in Mr Campbell's hands, he required him to apply it in a particular way, but was informed by

June 28. 1825.

2D DIVISION.
Lord Pitmilley.

June 28. 1806,

him that he was unable to do so. On the 18th May Mr Campbell wrote to the manager of the querried, that 'in making out the bills for the ensuing year, you will attend, in consequence of arrangements, they are now to be drawn payable to your order, at the Royal Bank, Edinburgh, and that they be blank indorsed by you.' A copy of this letter was transmitted by Mr Campbell's son to the appellant, in which he said, 'I have the honour of enclosing a letter from my father to the manager at Easdale, which went this night, and will of course put all matters right. The bills were formerly payable to my father; after being accepted by the purchasers. As they come up, they will be lodged in the Royal Bank, who will draw the proceeds; and retain them until further orders.' The manager acknowledged the receipt of the letter on the 2d June, in which he stated, 'that the alteration in the form of drawing the bills will be attended to.' The appellant was not satisfied, and caused Duncan Campbell, his land factor, to call upon the manager, and desire the bills to be in future taken payable to the factor. Accordingly the manager, on the 6th June, wrote to Mr Campbell, that 'Lord Breadalbane's factor called here this morning, and intimated his Lordship's wishes that the bills were to be drawn in future payable to his Lordship's factor: to this I answered, that I would write you on the subject. You will please, therefore, send me the exact form you wish, and the kind of indorsation, to prevent any inaccuracy hereafter, as I find myself at a loss how to act till I hear particularly on the subject.' In answer to this Mr Campbell's son wrote to the manager on the 18th, that 'My father will himself write you about Easdale; in the mean time I beg to mention to you, that the bills are all to be payable, and drawn in favour of Mr Duncan Campbell, —that is, Lord Breadalbane's factor.

From the state of Mr Campbell's affairs the appellant found it necessary to employ another agent, who, on the 26th of June, caused a notorial protest and intimation to be served on the manager, by which the procurator for the appellant intimated to him the assignation, 'and required him to enter the said intimation in the books of the Company, by a minute to the effect foresaid, and required that he, the said Alexander Campbell, should deliver to him a certified copy of said entry or minute, and give effect to the said deed by immediate possession, and by paying over to Duncan Campbell, Esq. factor for the said Earl in Argyllshire, all such sum or sums of money, bills, or securities, as were then in his the said Alexander Campbell's

“hands, arising from the share of profits or dividends of said Com- June 29: 1824.
 “pany, formerly due to the said John Campbell, but then to the said
 “Earl, in virtue of the said deed of conveyance,” &c. A second
 notarial intimation was made on the 31st July, and a certificate
 was granted by the manager in these terms:—“I, Alexander
 “Campbell, manager of the Marble and Slate Company of Nether
 “Lorn, do hereby certify, that upon the 28th day of June last,
 “the foregoing conveyance was intimated to me, in name of the
 “Earl of Breadalbane, conform to a schedule delivered to me of
 “that date, and engrossed in the books of the said Company;
 “and further, I certify, that the said conveyance was again inti-
 “mated to me this day by Duncan Campbell, Esq. his Lordship’s
 “factor in Argyllshire; and in consequence of these several in-
 “timations possession was respectively given to his Lordship, by
 “delivery to his said factor of bills due to the Company, for pur-
 “chases of slates sold by me on their account,” &c. On the 11th
 August Mr Campbell executed a trust-deed in favour of Mr
 Claud Russell for behoof of his creditors, and on the 21st he was
 rendered legally bankrupt, being within sixty days from the first
 notarial intimation. An action of reduction and declarator,
 founding on the statutes 1621 and 1696, and 54. Geo. III. c. 137.
 of the assignation in favour of the appellant, was then brought by
 Mr Russell, upon these grounds:—First, That the creditors for
 whose behoof the action was raised, were, at the date of the deed
 of conveyance, lawful creditors of Mr Campbell,—that the con-
 veyance was granted to the appellant, without any just cause or
 adequate price,—that it remained latent in defraud of the credi-
 tors,—and that the conveyance, therefore, was null and void, in
 terms of the Act 1621, c. 8. Secondly, That the conveyance
 was intended as a security of a former debt, granted by a person
 insolvent, with the view of giving a preference to the appellant
 over the other creditors,—that the granter of the deed was ren-
 dered legally bankrupt upon the 21st of August 1818, within
 sixty days of the intimation or delivery,—and that the conveyance,
 therefore, was null and void, in terms of the Act 1696, and also
 by the provisions of the later bankrupt statutes. And, thirdly,
 That the conveyance was granted in trust, or in security of a
 limited sum, inadequate to the real value of the subject convey-
 ed, and, therefore, that it could in no respect be made available
 to any greater extent than the sum really paid.

In defence the appellant pleaded, that the delivery of the deed
 to him was sufficient to complete his right; and that, at all events,
 that supposing intimation or possession were requisite, this had

June 28. 1825. been given and acquired by the communications to the manager, and by the bills being ordered to be taken payable to his factor. The Lord Ordinary pronounced this interlocutor:—‘The Lord Ordinary having considered the mutual memorials for the parties in the case, and whole process, in respect the granter of the conveyance or assignation of the 23d of June 1813 was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, finds, that the assignation was not completed, to the effect of giving a preference to the assignee in a question with the creditors of the cedent; sustains the reasons of reduction, and reduces, decerns, and declares in terms of the libel.’ To which interlocutor his Lordship afterwards adhered upon advising a representation, with answers. The appellant having reclaimed, the Court, on the 3d December 1822, by a majority, ‘adhered to the interlocutor of the Lord Ordinary complained of, in so far as it finds, that, in respect the granter of the conveyance or assignation challenged was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, the assignation was not completed, to the effect of giving a preference to the assignee in a question with the creditors of the cedent; but, before answer, remitted to his Lordship to hear parties further on the conclusions of the libel, and do as he shall see cause.’ *

The Earl then appealed.

Appellant.—It is necessary to attend to the relative situation in which the parties stood. The appellant was the landlord, and the Company the tenant. He and Mr Campbell were also joint tenants, and they were likewise the sole members of the partnership. The assignation, therefore, when delivered to the appellant, was complete in every respect as a conveyance of Mr Campbell’s right as tenant; because it was a deed of transfer executed several years prior to his bankruptcy, and consequently effectual to divest him; and the delivery to the appellant as landlord was the only and the best intimation that could be made. Again, it was effectual as a transfer of Mr Campbell’s share as a partner in the Company; and as he and the appellant were the only partners, and it was executed by the one and delivered to the

other, it was impossible that any more complete intimation could be given. In whatever light, therefore, the case is viewed, an effectual right was vested in the appellant. The manager was a mere servant, and consequently, intimation to him would have been productive of no effect. But the proceedings in June 1818 are important, as establishing a change of possession. June 28. 1825.

Respondent.—The assignation remained latent till the first notorial intimation was made, and in that document it was admitted, that no previous possession had taken place, or intimation been given. Accordingly it appears from the books, that no alteration was made on the right of parties, and that Mr Campbell drew his share of profits as if no conveyance had been executed by him. In a question with creditors, therefore, the assignation must be considered as latent, and consequently incapable of conferring a preference. It is declared by the Bankrupt Statute, that until intimation shall be made, or possession taken, no assignation shall be effectual against them. It is impossible to regard the correspondence with the manager as productive of a change of possession.

The House of Lords ordered, ‘ that the cause be remitted back to the Court of Session, to review generally the interlocutors complained of; and, in reviewing the same, the Court is especially to consider how and to whom intimation of the assignation ought to have been given: And it is further ordered, that the Court to which this remit is made, do require the opinion of the Judges of the other Division in the matters and questions of law in this case, in writing, which Judges of the other Division are so to give and communicate the same; and after so reviewing the interlocutors complained of, the said Court do and decern in this cause as may be just.’*

LORD GIFFORD.—My Lords, There is a case which stands for your Lordships’ judgment, involving an extremely important question in the law of Scotland—the case of Lord Breadalbane v. Russell. That was an appeal from several interlocutors of the Lords of Session, in an action arising out of the following circumstances:—It appears that, in the year 1748, the then Earl of Breadalbane granted two leases of certain slate and marble quarries, situated at Easdale, in the county of Argyll, with two adjoining farms, to Mr Campbell of Carwhin, and Mr Campbell, cashier of the Royal Bank of Scotland, and certain other persons, who formed themselves into a Company, for the purpose of

* See 5. Shaw and Donlop, No. 433. for the result of the remit.

June 28. 1825. working the quarries. The concerns, it appears, were afterwards left entirely to Mr Campbell of Carwhin and Mr Campbell of the Royal Bank. The tacks were at first granted for three nineteen years from Whitsunday 1746, and were afterwards prorogated for an additional term of two nineteen years, so that they do not expire until 1841.

My Lords,—The present appellant, and Mr John Campbell, writer to the signet, succeeded to these leases, as the heirs of the two original tacksmen, their fathers, and became the sole partners of the Company, which was called the Easdale Slate Company. In the year 1780, the appellant, Lord Breadalbane, succeeded to the title and estates of his cousin, the late Earl of Breadalbane, and thus became proprietor of the farms and quarries possessed by the Easdale Slate Company as tenants; so that he united in himself, at the same time, the character of proprietor of the lands and quarries, and he was joint tackman with Mr John Campbell in this lease. The superintendence of this concern devolved upon Mr Campbell, writer to the signet, who was for many years employed in the general management of Lord Breadalbane's affairs. There was, indeed, an overseer resident at Easdale to take charge of the works, but he was a mere servant of the Company, the management of the concern being conducted solely by Mr Campbell. It appears, that the custom was for the overseer to draw bills on the purchasers of the slates, which were made payable to Mr Campbell, at his office in Edinburgh, to whom they were sent, in the first instance, for the purpose of getting them accepted, and when due to get them paid. Mr Campbell was also occasionally in the habit of visiting the quarries, of giving directions for their management, and of annually settling the overseer's accounts; and, in his general account with the appellant, he gave him credit for the one-half of the profits.

Matters continued upon this footing until the month of March 1813, when Mr Campbell, who, it appears, was engaged in a variety of other concerns, wanting money, applied to the Earl of Breadalbane to join him in security for a loan of money, which he represented as a matter of the utmost consequence to him at that period. The security he proposed to give him for his relief, was an assignment of his share in those tacks, and in the stock of the Easdale Company. The Earl of Breadalbane, to oblige Mr Campbell, acceded to this request, and accepted two bills, one for L. 5000, and the other for L. 1000, drawn by Mr Campbell, at twelve months' date. Mr Campbell granted a letter of relief in the mean time; and for completing the proposed security, the following deeds were executed:—Of the date of the 23d June 1813, Mr Campbell, on the narrative of certain good causes and considerations, granted an absolute and unqualified conveyance, in the appellant's favour, of his interest in the Easdale quarries, being one-half; but under the exception of a previous assignation which he had granted to his wife, in her contract of marriage, in security of her jointure of L. 400 a-year, in the event of her surviving him.

Upon obtaining that conveyance, Lord Breadalbane executed a

June 28. 1825.

back-bond in favour of Mr Campbell, in which, upon the narrative of the conveyance, and of the bills which he had accepted, he declared that the said conveyance was granted in trust, and for his relief and indemnity of the said cautionary engagements come under by him on account of the said John Campbell; and whenever the said John Campbell, or his foresaids, should relieve him of payment of the bills above-mentioned, if the same should be put into circulation, and of the payment of all other bills which he might hereafter accept without value, or on his own account or for his accommodation merely, and of all damage, interest and expense, which he might have incurred in relation to the said bills or cautionary engagements, or whenever he should recover payment of the same from him, and of all charges and expenses incurred in relation to the premises in any manner of way;—then Breadalbane thereby bound and obliged himself, his heirs, executors, and successors whomsoever, on the expense of the said John Campbell, and his foresaids, in their own right and place of the premises; declaring that he is not to be liable any farther than for his own actual intromissions, by virtue of the conveyance aforesaid, and that he is not to be liable in diligence, nor for omissions of any kind; but declaring that he should be obliged, as he thereby bound and obliged himself, and his foresaids, to account to the said John Campbell, and his foresaids, for all sums of money which he should actually receive in virtue of his conveyance, beyond the foresaid principal sums of L. 5000 and L. 1000, and interest and expenses if incurred: So that your Lordships perceive, that the effect of this instrument was what we should call in this country a mortgage of Mr Campbell's share in this Eastdale slate quarry concern to my Lord Breadalbane, to secure my Lord Breadalbane against the bills which he might be called upon to pay for Mr Campbell.

This conveyance by Mr Campbell was delivered to the appellant, Lord Breadalbane, immediately after it was executed, and was by him deposited among his other papers in the charter-room at Taymouth. Mr Campbell appears to have had the management of this concern for several years afterwards. The bill for L. 1000, which had been discounted at the Royal Bank, was taken up by Mr Campbell; but the other bill for L. 5000 was renewed by bills of subsequent dates, accepted by Lord Breadalbane; and the debt was at last paid by Lord Breadalbane to the Bank.

My Lord Breadalbane, it is stated, went to the Continent in 1816, and did not return till 1818. Upon that occasion, being aware of a considerable sum of his rents being in Mr Campbell's hands, he wrote to Mr Campbell to desire he would furnish him with a state of his accounts, and employ the balance, which amounted, as my Lord Breadalbane states, to upwards of L. 10,000, in paying the balance of the price of an estate which my Lord Breadalbane had recently purchased. On that occasion, as it turned out, Mr Campbell was obliged to explain the state of his affairs, and to acknowledge that it was altogether out of his power to make this payment. Upon that coming to Lord

June 28. 1825. Breadalbane's knowledge, he thought it would be proper to take immediate legal steps to make effective the security which he had obtained over Mr Campbell's share of the Easdale Company; and, upon that occasion, his Lordship communicated with Mr John Archibald Campbell, the son of Mr Campbell, upon the subject of the state of his father's affairs; and in consequence of directions given by Lord Breadalbane, Mr John Campbell wrote to the overseer at Easdale, to make a change as to the mode of the remittances, by a letter, dated Edinburgh, 28th May 1818, in these terms:—‘DEAR SIR, I notice, by your letter of the 12th instant, that all the bills for the sales at Easdale for the year ending Martinmas 1817 are transmitted. In making out the bills for the ensuing year, you will attend, in consequence of arrangements, they are now to be drawn payable to your order, at the Royal Bank, Edinburgh, and that they be blank indorsed by you.’

It is stated, that, in order that the appellant might see that his instructions with regard to the appropriation of these remittances had been duly obeyed, Mr John Archibald Campbell transmitted a copy of the above letter to him in London, writing, at the same time, as follows:—‘I have the honour of enclosing a letter from my father to the manager at Easdale, which went this night, and will of course put all matters right. The bills were formerly payable to my father, after being accepted by the purchasers. As they come up, they will be lodged in the Royal Bank, who will draw the proceeds, and retain them, until further orders.’

My Lords,—It appears that my Lord Breadalbane thought that the change which had been thus directed, with respect to the mode of drawing the bills, might not be sufficiently effectual, and that it was necessary to go a step farther; and he ordered that the bills should be made payable directly to himself. For this purpose, upon the 6th of June 1818, Mr Duncan Campbell, who was the appellant's factor in Argyllshire, called upon the overseer at Easdale, and required him for the future to make the bills payable to him.

This is noticed in a letter from the overseer to Mr John Campbell, dated the 6th of June, in which he says,—‘Lord Breadalbane's factor called here this morning, and intimated his Lordship's wishes, that the bills were to be drawn in future payable to his Lordship's factor: to this I answered, that I would write you on this subject. You will please, therefore, send me the exact form you wish, and the kind of indorsation, to prevent any inaccuracy hereafter, as I find myself at a loss how to act, until I hear particularly on the subject.’

This letter was answered by Mr John Archibald Campbell, the son of Mr John Campbell, in a letter of the 18th of June, in which he says, ‘My father will himself write you about Easdale; in the mean time I beg to mention to you, that the bills are all to be payable and drawn in favour of Mr Duncan Campbell.’ The matter was thus settled, and the manager acted upon this order, from that time forward, in making his remittances.

June 28. 1825.

My Lords,—After the above intimation had been given to the overseer at Easdale, with regard to the mode in which the remittances were for the future to be regulated, Lord Breadalbane found it necessary, in consequence of the state of Mr Campbell's affairs, to employ another man of business; and having selected Mr Harry Davidson, writer to the signet in Edinburgh, for this purpose, that gentleman, immediately upon his appointment,—a stranger, it is stated, entirely to the Earl of Breadalbane's affairs—unacquainted with the precise nature of the conveyance, which remained in the depositaries at Taymouth, to which he had not at that time access—and ignorant of the previous intimation which had been made to the manager of Easdale;—directed his son to proceed to that place, and make such intimation as he could, to any clerk or manager of the Company whom he might find upon the spot, of the conveyance which had been executed in favour of the appellant in 1813.

My Lords,—Shortly after this Mr Campbell was made a bankrupt, namely, on the 21st August, within sixty days after this intimation which had been given by Mr Harry Davidson, so that no legal effect could be attached to that intimation. On the 11th of August 1818 Mr Campbell executed a trust-deed of his whole estate, real and personal, in favour of Mr Claud Russell, accountant in Edinburgh, the respondent in this cause. This deed was afterwards intimated to Lord Breadalbane, but he never acceded to the trust.

My Lords,—An action of reduction and declarator was afterwards brought before the Court of Session, at the instance of the trustee Mr Russell, and also certain creditors of Mr Campbell, against Lord Breadalbane, concluding for reduction of the conveyance of his share of the stock of the Easdale concern, and the instrument of the intimation and possession which had been taken on the 26th of June, upon three grounds:—First, That the creditors for whose behoof the action was raised were, at the date of the deed of conveyance, lawful creditors of Mr Campbell,—that the conveyance was granted to the appellant, without any just cause or adequate price,—that it remained latent, in defraud of the pursuers, and that the conveyance therefore was null and void, in terms of the Act of 1621, chap. 8. Secondly, That the conveyance was intended as a security of a former debt, granted by a person insolvent, with a view of giving a preference to the appellant over the other creditors,—that the granter of the deeds was rendered legally bankrupt upon the 21st of August 1818, within sixty days of the intimation or delivery,—and that the conveyance therefore was null and void, in terms of the Act of 1696, and also by the provisions of the later bankrupt statutes. Thirdly, That the conveyance was granted as a trust, or in security of a limited sum, inadequate to the real value of the subject conveyed, and, therefore, that it could in no respect be made available to any greater extent than the sum really paid.

This case was remitted to Lord Pitmilley, and his Lordship granted

June 28. 1825.

a diligence to recover such written evidence as appeared to either party to be material to the cause, and afterwards ordered memorials; and his Lordship, on the 21st of March 1821, pronounced the following interlocutor:—‘The Lord Ordinary having considered the mutual ‘memorials for the parties in the case, and whole process, in respect ‘the granter of the conveyance or assignation of the 23d of June 1813 ‘was allowed to continue in possession of the subject conveyed, and ‘that no intimation of the assignation was made till within sixty days ‘of his bankruptcy, finds, that the assignation was not completed to ‘the effect of giving a preference to the assignee in a question with ‘the creditors of the cedent; sustains the reasons of reduction, and ‘reduces, decerns, and declares in terms of the libel.’

To that interlocutor his Lordship afterwards adhered, upon advising a representation, with answers.

My Lords,—Upon this the appellant presented a petition to the Second Division against the Lord Ordinary’s judgment; and the Second Division pronounced this interlocutor:—‘The Lords having ‘advised this petition, with answers thereto, adhere to the interlocutor ‘of the Lord Ordinary complained of, in so far as it finds, that, in respect the granter of the conveyance or assignation challenged was ‘allowed to continue in possession of the subject conveyed, and that ‘no intimation of the assignation was made till within sixty days of his ‘bankruptcy, the assignation was not completed to the effect of giving ‘a preference to the assignee in a question with the creditors of the ‘cedent; but, before answer, remit to his Lordship to hear parties ‘further on the conclusions of the libel, and do as he shall see ‘cause.’

My Lords,—Against this interlocutor an appeal has been brought to your Lordships’ House; and a question, which, as it seems to me, is of as great importance as any question which has been discussed at your Lordships’ Bar during this session, has arisen, namely, to what extent, and in what manner, an intimation was necessary, in this case, of this deed of assignation executed by Mr Campbell. My Lords, I say it is a most important question, because it undoubtedly affects the rights of persons in possession under tacks, seeking to raise money on the security of that interest which they may have in these tacks, and particularly as to the mode in which they can be permitted so to obtain money; it being stated, and stated from books of high authority in the law of Scotland upon this subject, that the general law was, that intimation was necessary in an assignation.

My Lords,—The general doctrine upon this subject is thus laid down by Mr Erskine. He says,—‘A tack must also be accompanied ‘by possession, in order to secure the tenant against the singular successors of the granter; for though leases, in the form in which they ‘have been executed for several centuries past, admit not of symbolical possession by sasine, yet natural possession is required for giving ‘the effect of a real right; and hence a posterior lease, followed by

June 28. 1825.

'possession, is preferable to a prior upon which there has been no possession. Though, therefore, the granter was proprietor at the date of the tack, yet, if he shall be divested of his right before the term of the tenant's entry, the tack cannot affect singular successors, because a tenant can have no possession on his tack till the term of his entry.' Then he goes on:—'Possession is as necessary for securing the transmission of a tack or sub-tack to an assignee or sub-tacksman, as for securing the tack itself to the original tacksman; or, at least, there must be some publication by which the conveyance must be made known, that so third parties may not be ensnared by latent or private conveyances, and because the adjudication of a lease is a public and judicial act of the Supreme Court transferring the right to the adjudger. A creditor adjudging that right from the tacksman, before the tacksman's voluntary assignee has obtained possession upon his conveyance, is preferable to the assignee.' Then my Lord Stair also says,—'Possession is requisite not only to the conveyance of the property of moveable goods, but also of liferent rights, tacks, and rentals, servitudes, pledges, &c.; which tacks, though they be truly personal rights of location, and constitute only as real rights by the statute, yet intimation will not transmit them; but there is a necessity of possession.'

My Lord Kilkerran was also cited, who lays it down, that 'the transmission of the property of moveables is completed by delivery; of lands, by infestment; of nomina, by intimation; of tacks and other rights which require no infestment, by possession; and, therefore, between two tacks, or between two sub-tacks, it is the first possession that determines the preference.'

My Lords,—It is admitted in this case, that, by the law of Scotland, there is no public intimation required in any particular form, or in any particular manner, to give validity to an assignation like that which has been made in this case; and it was stated that a case had been decided by the First Division of the Court, *Yeoman v. Elliot and Foster*, 2d February 1813, on this subject; and the short-note of that case at the head of the report is,—'A right to a lease by assignation is completed by entry of the assignee's name as tenant in the landlord's rental-book.' My Lords, in that case, two persons of the name of Wilson and Main were manufacturers in Langholm; each of them held long leases of houses and building areas in that village, from the Duke of Buccleugh. Those leases they assigned in May 1810 to Mr Elliot in trust, for Messrs Elliot and Foster, bankers in Carlisle, in security of advances in money to be made to them, for the purpose of carrying on their trade. Upon receiving this assignation, Mr Elliot had his name enrolled in the Duke of Buccleugh's rental-books, and granted sub-tacks to Main and Wilson, who thereby remained in possession of their respective subjects; so that your Lordships perceive the intimation in this case was by Mr Elliot's procuring his name to be enrolled in the Duke of Buccleugh's rental-books, the

June 28. 1825. Duke of Buccleugh being proprietor of the land. Main and Wilson becoming bankrupts, the estate of Wilson was sequestrated upon the 15th of October 1810; the estate of Main, upon the 22d of the same month. At the date of their bankruptcy, both those persons were indebted to Elliot and Foster in sums greatly exceeding that of L.1000, in security of which their leases had been assigned. Intimation was given by these gentlemen to the bankrupts, and to Yeoman, the trustee upon their estates, that they meant to bring the lease of their subjects to sale, by virtue of a clause in the assignation empowering them to do so, in the event of sums advanced by them not being paid up in a certain time. A sale of the leases was then advertised, against which a bill of suspension and interdict was offered by the trustee, and passed. Upon the cause coming into the Outer-House, the Lord Ordinary pronounced an interlocutor, in which there are various findings of the facts; and the conclusion was, that, under the circumstances, the securities given by Main and Wilson to Elliot were sufficiently completed, and rendered preferable; and being of opinion that these securities were not liable to any challenge on the Act 1696, repelled the reasons of suspension, and decerned.

My Lords,—Against that interlocutor there was a representation, upon which occasion the Lord Ordinary adhered to his interlocutor: it was finally brought under the review of the Court of Session. On advising the case, I would just state to your Lordships, the argument against this interlocutor was, that the assignation to Elliot was never made effectual, as no possession or publication had followed upon it; and it could not, therefore, be preferred to the rights of the other creditors under the sequestration. Your Lordships perceive, that in that case there was no change of possession; the tenants continued in the possession, the assignee granted them sub-tacks; so that there was no alteration whatever of possession; and the only intimation was their intimating to the Duke of Buccleugh the fact, that they had become tenants by virtue of this. It was argued, that the want of possession could not be supplied by intimation to the landlord, nor by enrolment of the assignees in his rental-books, as the transfer of the property was not thereby made public; and the other creditors had been induced to transact with the bankrupts, from seeing them still in possession of the subjects in question.

My Lords,—That reasoning was answered by the other side; and the Court, in pronouncing judgment, said that which I am about to read to your Lordships. ‘To adopt the argument on this petition, would be to overthrow the credit of the whole tenantry in the country. A lease is merely a personal right, the parties to which are the landlord and the tenant: this right is transferable, like all other personal rights, by assignation, and the transference is completed by intimation to the only other person concerned, the landlord. How that intimation is made, is of no consequence, if it be acknowledged that it was made: the assignation may be secret, known only to the

'parties to the transaction ; but this cannot be helped, it arises from the nature of the right. Even where there is a subtenant, he may pay his rent without any one knowing to whom, or who is in right of the lease. The case of *Hardie Douglas* is negligently reported.' The Court concurred in his Lordship's opinion, and adhered to the interlocutor of the Lord Ordinary. June 28. 1825.

My Lords,—Under the authority of that case, it was argued by the appellant in this, that, as far as it was a decision, it decided, that all the intimation necessary of the assignation of a tack, was an intimation by the assignee to the proprietor of the land, that he had become possessed of an interest in the tack ; that, in this case, the party, who was a tenant and tacksman, having assigned it to the landlord himself, the proprietor, the very assignation amounted to that intimation which was held sufficient in the case to which I have referred your Lordships. With respect to the notification, it was contended that it was not sufficient, but that a notification should have been given to the overseer of the work that there had been this change : but it was said, that giving notice to him was only giving notice to themselves ; that he was their mere agent to conduct the business there ; that he was removable at pleasure ; that any other overseer might be appointed ; and it was therefore too much to say, that intimation was to be given to that overseer. But it was argued, that some public notification was necessary : I do not find that advertisement in the *Gazette*, or in any public paper, has been required.

It is then said there was no change in possession. My Lords, there was no change of possession in the case to which I have referred ; but all that had taken place, namely, that letter of the 18th of June, more than sixty days prior to the bankruptcy, and by which a very material change took place as to the mode in which the business was to be conducted. The bills were to be drawn in favour of Lord Breadalbane, and not of Mr Campbell. It was argued, that this notice should have appeared in the books. My Lords, the books are not accessible to the public ; the books were not accessible to the creditors of Mr Campbell ; and, therefore, it does not appear to me how that could have any effect.

My Lords,—The principles applying to this decision appear to me to be in direct opposition to the case to which I have referred your Lordships. In that case, all which was done was intimation or notification to the factor, he being a party to the transaction : and, with respect to change of possession, it was not part of the transaction that there should be a change of possession, for it was merely to be a security.

My Lords,—Another case has been argued at your Lordships' Bar this session, but which stood over on an objection which arose in the course of the discussion of that case, in which a similar question has been raised—the case of the *Glasgow Bank v. Brock*,* in which the

* See Vol. III. p. 75.

June 26. 1825.

Lords of the Second Division had come to the same decision to which they have come in this case of Lord Breadalbane, that in that case there had not been a sufficient intimation of the assignation. My Lords, this decision, however, of the Second Division has not been a unanimous decision; for my Lord Craigie was of opinion, that the assignation in that case required no intimation, and he was therefore for altering the interlocutor.

My Lords,—Considering the very great importance of this case, for I do conceive it is of very great importance, as it affects the rights of parties in Scotland; and seeing the different decisions, which I think are not to be reconciled, that of the First Division, and that in this case; and, as I stated to your Lordships, the question so materially affecting the rights of parties,—I must confess, that in this case I should be extremely sorry to call upon your Lordships now for a decision. My humble recommendation to your Lordships would be, to remit this case for the further consideration of the Second Division of the Court of Session, intimating, perhaps, in that remit, a wish on your Lordships' part, that, in reconsidering this case, they should consider particularly how and in what manner intimation ought to have been given in this case; because they have not pointed out in what manner intimation ought to have been given; and I think it is highly desirable, that upon that, and upon the other points of this case, we should have the benefit also of the opinion of the First Division of the Court of Session.

My Lords,—If the other case had been fully heard before your Lordships, I probably should have recommended your Lordships rather to make a remit in that case than in this, because I think the point is more nearly brought out in that case than in this; but, at the same time, I think the particular point is sufficiently raised in this case. The Court of Session have not proceeded in this case on any ground of fraud,—I do not mean in the common acceptation of the word,—but legal fraud between Lord Breadalbane and Mr Campbell. They do not reduce on any such ground, but their general finding is, 'that in respect the granter of the conveyance or assignation challenged was allowed to continue in possession of the subject conveyed, and that no intimation of the assignation was made till within sixty days of his bankruptcy, the assignation was not completed to the effect of giving a preference to the assignee in a question with the creditors of the cedent.' Their decision, therefore, is founded on these distinct propositions,—propositions which, as I have said, are most important to the rights of parties holding as these parties do; affecting, in the first place, I admit, that which the law of Scotland is very jealous of, secret assignations without any public or formal notification of them, so that the world may be apprized how they stand; but affecting also rights of tenants under tacks; because, if this decision be, as it may ultimately turn out to be, a right decision, it will follow, I think, to be extremely difficult for a tenant in possession of a large farm, whose only means of raising money to carry on that farm may be by assigning his interest to another, to obtain that assistance which he requires,

if that cannot be effected without change of possession, which will defeat all the man's views by putting him out of possession, and suffering the assignee to come in, and then rendering another change of possession back again necessary. I am not apprized in what way that could be done, or what steps a man, who, though in possession as a tacksman, still has assigned his interest to some body else for the benefit of the other person, or for advances he may have made, ought to take. These are questions of a most important nature, as affecting the rights of the public and the rights of the creditors on the one hand, and on the other hand the rights of the party, that being the only means, probably, by which he may be enabled to go on.

My Lords,—However much I regret that there should be farther delay in settling the rights of these parties, yet, after a great deal of anxiety on this subject, really the result of my impression has been, that the proper course will be to remit the case in the way I have stated, that we may have the benefit, if it comes here again, of the opinion of all the learned Judges in Scotland on this most important subject. For these reasons, therefore, I should humbly propose to your Lordships, neither to affirm nor reverse at the present moment, but to remit this case for the further consideration of the Court of Session, requesting their decision upon the point which I have stated to your Lordships, how and in what manner intimation, in their judgment, ought to have been given in this case, in order to secure the right of Lord Breadalbane under this assignation; and I should propose to your Lordships, that the Second Division be requested to take the opinion of the First Division of the Court of Session, so that we may have the advantage of the opinion of all those very learned persons on this question. It will be to me personally, and I have no doubt will be also to every one of your Lordships, a great satisfaction to have the advantage of their opinion, before your Lordships are called upon to settle finally what shall be the law in these cases in future. In order that I may present to your Lordships a minute in the proper form, I would move your Lordships that this case shall stand for further consideration on Tuesday next.

Appellant's Authorities.—3. Stair, 1. 9.; 3. Ersk. 5. 4.; 2. Bank. 193.; Montgomerie, July 27. 1873, (841.); Argyll, Dec. 14. 1876, (842.)

Respondent's Authorities.—2. Ersk. 6. 25.; 3. Stair, 2. 6.; Kirk. 145.; Brock against Cappel, Nov. 29. 1822, (2. Shaw and Dunlop, No. 54.); Watson, Nov. 19. 1755, (850.); 3. Ersk. 3. 5.

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 55.

WILLIAM DIXON, Appellant.

MONKLAND CANAL COMPANY, Respondents.

Condition—Repetition—Judicial Remit.—Held, 1. (reversing the judgment of the Court of Session), That a Canal Company, who, in order to make their canal navigable for vessels drawing four and a half feet water, were authorised to levy certain increased dues, were not entitled to do so before the canal was so navigable; 2. That they were liable in repetition of the dues exacted prior to the canal being so rendered navigable; and, 3. (affirming the judgment), That a party having acquiesced in a judicial remit to a person of skill, was not thereafter entitled to insist on a proof in regard to facts reported upon by that person.

June 29. 1825.

2d DIVISION.
Lord Reston.

IN 1770, an Act of Parliament was obtained, authorizing certain parties (incorporated by the Act under the name of ‘ the Company of Proprietors of the Monkland Navigation’) ‘ to make and complete a cut or canal of three feet depth of water, navigable and passable for boats, barges, and other vessels, from the Monkland collieries in the county of Lanark, beginning at a place called the Sheepford, in the parish of Old Monkland and county aforesaid, passing by or near the house of Drumpellier, by or near the Wellhouse bleachfield, to or near the city of Glasgow, and river Clyde.’ The Company were also empowered to make a waggon-way. The property of the canal was divided into one hundred shares of L. 100 each; and the statute bore, ‘ that in consideration of the great charges and expenses which the said Company of proprietors, their successors and assigns, will be at in making, maintaining, and supplying with water the said cut or canal, and road or waggon-way aforesaid, and in making and maintaining all the other works hereby authorized to be made and erected, it shall and may be lawful to and for the said Company of proprietors, their successors and assigns, from time to time, and at all times hereafter, to ask, demand, take, and recover, to and for their own proper use and behoof, for tonnage and wharfage, for all coals, stones, timber, and other goods, wares, merchandises, commodities, and things whatsoever, which shall be navigated, carried, and conveyed upon or through the said cut or canal, such rates and duties as the said Company of proprietors, their successors and assigns, shall think fit, not exceeding the sum of 1d. sterling money per mile for every ton of coals, stones,

‘ timber, dung, fuel, and other goods, wares, merchandise, commodities, and things whatsoever, which shall be navigated, carried, and conveyed upon and through the said cut or canal.’ June 29. 1825.

The canal was made; but the undertaking not being successful, the Company entered into an arrangement with the Forth and Clyde Canal Company, and, in 1790, obtained an Act of Parliament, authorizing the Monkland Canal Company ‘ to make, complete, and maintain a cut or canal, for the purpose of forming a junction between the upper and lower lands of the said Monkland Navigation, at or near a certain place called Blackhill, and to extend the said Monkland Navigation from the east; and of the same at Sheepford, in a certain line passing by or near Faskine house to the river Calder, at or near Woodhall or Faskine mill; and to erect, build, repair, and maintain a sufficient number of locks between the different levels of the said canal, to render the same navigable and passable for boats, barges, and other vessels drawing four and a half feet water along the whole range of the said Monkland Navigation, and to widen, deepen, and enlarge the same where necessary for that purpose.’ Power was given to raise L.10,000; and the Act proceeds, ‘ And in consideration of the great charges and expenses which will necessarily be incurred by the said Company of proprietors of the said Monkland Navigation, in making, maintaining, and supplying with water the said cut or canal, and works connected therewith, it shall and may be lawful to and for the said Company of proprietors of the Monkland Navigation, their successors and assigns, from time to time, and at all times hereafter, to ask, demand, and recover, to and for their own proper use and behoof, for tonnage and wharfage, for all coals, stones, timber, and other goods, wares, merchandise, commodities, and things whatsoever, which shall be navigated, carried, and conveyed upon or through the said cut or canal, such additional rates and duties as the said Company of proprietors think fit, not exceeding the sum of 1d. sterling money per mile for every ton of coals, stones, timber, dung, fuel, and other goods, &c.; which said rates and duties shall be over and above, and in addition to the rates and duties contained in the Act before recited, passed in the tenth year of his present Majesty.’

The Company accordingly constructed the necessary locks, and made the cut or conjunction contemplated. In these and other matters essential to the canal they expended large sums,

June 29. 1825. stating that their expenditure above their income, including sums laid out in deepening, amounted to L.30,000, whereas the sum authorized to be raised by the statute, and deemed sufficient to meet the outlays required, was only L.10,000.

Dixon was proprietor of, and engaged in extensive coal and iron-works at the east extremity of the canal; and was in the constant habit of transporting to Glasgow a very large quantity of the produce of his mines by the Monkland Canal. The Company, in process of time, but, as was alleged, before deepening so as to render the canal navigable along the whole range for boats and barges drawing four and a half feet water, made a trifling addition to their charges, which was not challenged or objected to; but, Dixon learning that they had in contemplation to double the duty, raising it from 1d. to 2d. a-ton, still, as he said, without having deepened as directed, protested against the measure; and presented to the Court of Session a suspension and interdict against the exaction of tonnage dues beyond the rate of 1d. per ton per mile, as authorized by the statute 1770. The suspension was passed, but the interdict refused. Dixon then raised an action of declarator, concluding, that 'it should be found and declared, that the said cut or canal not being navigable or passable for boats and barges drawing four feet and a half depth of water, the said Company of proprietors, in imposing and levying tonnage duty at the rate of 2d. per mile, have exceeded the powers conferred on them by the aforesaid statute, and are acting in direct contravention thereof; and that they have no right or title to exact from the pursuer higher duties than at the rate of 1d. per ton for each mile, for all the goods, &c. navigated or conveyed by them along the said cut or canal; and the same being so found and declared, the said Company of proprietors of the Monkland Navigation ought and should be decreed and ordained, by decree foresaid, to reduce the duties upon coals, goods, wares, &c. navigated, carried, and conveyed by the pursuer upon and through the said cut or canal to 1d. for each ton per mile, and to cease and desist from imposing or levying from the pursuer a higher rate of duty;' and that the sums unduly levied should be repeated.

The Lord Ordinary found, that 'the Company are, in the first instance, entitled to levy the duties asked by them; but that, in consequence of their doing so, the pursuer is entitled to reasonable implement of those improvements in the navigation, in consideration of which the exaction of said duties was autho-

June 29. 1825.

‘rized by the Legislature; and, before further answer, grants diligence to both parties for the recovery of written evidence, with a view to a remit to the Jury Court.’ Both parties represented, but the Lord Ordinary adhered, ‘in respect it was not meant by the interlocutor complained of to enforce specific implement, otherwise than as affecting the right of levying dues, and that it will be entire, after the facts in the revised condendences and answers are ascertained by the verdict of a jury, (to which both parties seem at present averse), or otherwise, to pronounce what order may be judged proper as to the rates already levied, or to be levied by the Company.’

The Company, in reclaiming to the Court, endeavoured to make out that they lay under no positive obligation so to deepen the canal; but latterly they stated by a minute, ‘That from the date of passing the statute 1790, to the announcement of the present action, the proprietors had expended upon the canal upwards of five times the sum allowed to be raised by the Act of Parliament: that since completing the extension of the canal to Faskine, and the locks at Blackhill, the proprietors had been gradually deepening the canal along its whole range; so that, at the commencement of the present action, the canal had been deepened to upwards of four feet six inches: that at present the upper and lower range of the canal had been deepened to five feet six inches, and the middle range to at least five feet, and the proprietors were in the course of continuing to deepen the middle range; so that during the present summer the same would be passable for vessels drawing four feet and a half of water, and which must be held reasonable implement in terms of the Lord Ordinary’s interlocutor. But to put an end to further discussion regarding this point, the proprietors were willing to complete the deepening of the canal, under the inspection of any eminent engineer to be named by the Court, until the engineer shall report that the same is navigable along its whole range for vessels drawing four feet and a half depth of water, in terms of the statute, and for this purpose to employ such a number of workmen as they shall be directed by the engineer, so as to complete the same within such time as the engineer shall report to be reasonable.’

Answered by Dixon.—‘The statements about expenditure on the canal were very far from being admitted to be correct; and it was in vain for the defenders to have recourse to such statements, so long as they obstinately refuse inspection of their books to the pursuer. If the defenders mean bona fide to make

June 29, 1825. ' and complete the canal in terms of the statute 1790, the pursuers certainly can have no objection that this shall be done, ' reserving all questions about tonnage dues heretofore unduly ' exacted. But the offer in the minute is defectively and evasively expressed; plainly for no other purpose than to obtain ' a pretext for delay, while the defenders are unduly exacting ' tonnage dues to which they have no right.'

The Court, in respect of this minute, ' before answer, ordained ' the said proprietors to complete the deepening of the canal, under the inspection of Thomas Telford, Esq. engineer; and failing ' of him, of Robert Stevenson, Esq. engineer; until the engineer ' so inspecting shall report that the same is navigable along the ' whole range for vessels drawing four feet and a half depth of ' water, in terms of the statute; and for this purpose ordained ' such number of workmen to be employed as such engineer shall ' direct, so as to complete the same within such reasonable time ' as to the engineer shall seem to be reasonable; and ordained the ' said engineer to report thereon to the Court.'

Dixon petitioned; stated that the Company's offer was evasive, and that the undertaking ought to be in terms of the statute, ' to ' render the same navigable,' &c.; and prayed to be found entitled ' to repayment of all the tonnage dues paid by him above the ' rate of 1d. per ton per mile since 24th May 1815 to the present ' time, and to allow an interim decree to that effect to go forth; '—to be found liable ' for no higher rate of tonnage dues than 1d. ' per ton per mile on any goods whatsoever, conveyed along the ' Monkland Canal, till the Company of proprietors thereof shall, ' under the inspection of the engineer named by the Court, ' deepen and enlarge the canal in terms of the statute 1790; and ' to find the petitioner entitled to expenses.' The Court refused the petition.

Telford, on the 5th November 1819, then made this report:— ' Having, in compliance with the Act of the Lords of Council and ' Session, on the 3d and 5th days of November instant, inspected ' the whole of the Monkland Canal; and having a vessel loaded to ' draw 4 feet 6 inches of water along the same, and also carefully ' taken a variety of measurements,—I beg leave to report, that excepting about 100 yards at the upper extremity, where the feeder ' comes in, I found the canal navigable and passable for vessels ' drawing four feet six inches of water, in terms of the statute; ' and this was when the water stood level with the top of the top ' bars of the upper locks at Sheepford and Blackhill, and at five ' feet six inches upon the upper sills of the upper locks, and the

‘same on the lower sills of the lower locks at both these places. June 29. 1825.
 ‘And I may add, that from the state in which I found the canal, I am of opinion, for a moderate additional expense, it may
 ‘be made to admit vessels to navigate and pass, when loaded, to
 ‘draw four feet nine inches of water.’

Dixon objected to this report, alleging that he was not permitted to be present, although the Company’s overseer was, and that the people in their service were employed in the survey,—that the Company had flooded the canal with water to give an increased depth and facility to the progress of the boat,—that the boat was prepared for the experiment,—and that he had tried to navigate the usual kind of boat, drawing four feet six inches, but that the canal was substantially not navigable for that draught of water, being both too narrow and too shallow; and therefore prayed the Court either to allow a proof by commission, or send to the Jury Court the questions, 1st, Whether the Monkland Canal is at present fairly, in terms of the statute, navigable and passable for boats drawing four feet and a half water? and, 2dly, At what date this improvement took place, if it have taken place? The Court (17th February 1820) again remitted to Mr Telford to consider the objections made, and to be made to his report, with answers, and report his opinion thereon, with such remarks as he may think proper, in an additional report to the Court; and, in respect of this order, found certain interrogatories required by Dixon to be put to Telford to be unnecessary. Thereafter Telford reported, (April 1820), ‘1. That
 ‘the whole arrangements respecting the survey were made under
 ‘my direction, both as regards the keeping up the water and the
 ‘sort of boat to be employed; and I objected to either of the
 ‘parties being present in the survey, as being in my opinion
 ‘totally unnecessary for ascertaining the objects to which my
 ‘attention was directed. The keeping the lock-gates shut was
 ‘the simplest and most certain means of ascertaining what
 ‘height of water the canal banks would contain. 2. Although
 ‘the Company’s servant, John Finlay, attended by my desire to
 ‘answer such questions as I found it necessary to put to him,
 ‘my assistant in taking the dimensions of the canal was Thomas
 ‘Wilson, a boat-builder, who is no servant to, nor, as I am informed, has ever been employed by the Company, though he
 ‘has of course by the traders. He is merely a tenant upon a
 ‘twenty-one years’ lease of a piece of ground belonging to the
 ‘Canal Company; and I myself carefully examined and noted
 ‘each dimension which was taken. 3. The canal banks were

June 29. 1825. 'found capable of holding up water when navigated by boats
'drawing four and a half feet water; and it is the interest of the
'Company to preserve the canal to the full height. But in the
'state I found it, it will admit of a couple of inches being drawn
'down, by a number of boats passing the locks in immediate
'succession, and still remain navigable for boats drawing four
'and a half feet water. 4. The boat I selected, and had loaded
'and navigated along the canal, drawing four and a half feet
'water, was a regular trader, eleven feet two inches in width,
'which is, I understand, above the general width; and these may
'in general, and even larger, pass each other; and where nar-
'rower places occasionally occur, (as happens in most canals),
'passing-places are formed adjacent, as directed by a clause in
'the Act. 5. Upon the whole, the Canal Company have, in
'my opinion, fairly implemented the terms of the statute.'

Some further procedure took place, and Dixon persisting in the inaccuracy of Telford's reports, the Court allowed a condescendence and answers of what he (Dixon) averred and offered to prove to be the state of the Monkland Canal. Thereafter the Court, 'in respect there appears to be now sufficient imple-
'ment, on the part of the proprietors of the Monkland Naviga-
'tion, of the completion of the canal in terms of the statute,' in the suspension found the letters orderly proceeded, and in the declarator sustained the defences, and decerned. Dixon reclaimed, and accompanied his petition with a condescendence of what he offered to prove before a jury, or under a commission, and prayed, 1st, To be found 'in hoc statu entitled to repetition
'of the tonnage dues authorized to be imposed by Act 1790,
'from May 1815 down to the date of Mr Telford's first report,
'reserving the petitioner's claims quoad ultra;' and, 2d, To allow a proof of the facts as to the state of the canal, &c. The Court (16th November 1821) adhered, and found Dixon liable in expenses.*

Dixon appealed.

Appellant.—1. The respondents had no right to the double tonnage dues until they could give the corresponding accommodation,—that was the consideration for the increased rates. The statute does not authorize the reading put upon it by the respondents; the appellant is therefore clearly entitled to repetition of the excess which he has been illegally forced to pay. 2. Even now, the canal has not been enlarged in terms of the statute

* See 1. Shaw and Ball. No. 176.

1790. This the appellant offered to prove by a jury or a commission, but was refused. June 29, 1825.

Respondents.—1. The Act 1790 gives the respondents right to levy an additional tonnage ‘at all times hereafter;’ and this is not made to depend on the execution of any operation whatever on the navigation. 2. Several of the most expensive operations have been long ago completed. The deepening was to proceed at such seasons as were most convenient; and accordingly has proceeded. 3. The Act allows the additional rate to be levied in the first instance, it being the view of the Legislature, that the sums so levied should be the sums employed in the execution of the authorized improvements. 4. There has been reasonable implement of the obligations imposed on the Company, the expenditure on the canals amounting to three times the sum allowed by the Act to be raised for the improvement of the navigation. The appellant did not conclude that the respondents should deepen the canal, &c.; but, overlooking that irrelevancy, 5. There is evidence in Telford’s report that the canal has actually been deepened to be passable by vessels drawing four and a half feet of water. He reports, that, ‘upon the whole, the Company have, in my opinion, fairly implemented the terms of the ‘statute.’ The objection to the remit to Telford, or the application for a new proof, comes much too late.

The House of Lords found, ‘That the respondents were not ‘entitled to demand any additional rates or duties for tonnage of ‘goods conveyed upon the cut or canal in the said interlocutors ‘mentioned, under and by virtue of the statute made and passed ‘in the 30th year of the reign of his late Majesty, until the said ‘cut or canal had been rendered navigable and passable for ‘boats, barges, and other vessels drawing four feet and one-half depth of water. And the Lords further find, that, with ‘the acquiescence of the appellant, the Lords of Session directed ‘the deepening of the said cut or canal should be completed ‘by the proprietors, under the inspection of Thomas Telford, ‘Esq. engineer, and failing of him, of Robert Stevenson, Esq. ‘engineer, until the engineer so inspecting should report the ‘same was navigable along the whole range for vessels drawing four and a half feet depth of water, in terms of the ‘statute. And the Lords further find, that from the report ‘of the said Thomas Telford, so appointed as aforesaid, dated ‘5th November 1819, and from his additional report, dated 17th ‘April 1820, it appears that in his judgment the said cut or ‘canal was navigable and passable for vessels drawing four feet.

June 29. 1825. ' six inches of water, in terms of the statute, and that the Canal
' Company had fairly implemented the terms of the statute. And
' the Lords further find, that under the circumstances the ap-
' pellant is entitled to a repetition of the additional rates and
' duties demanded from and paid by him from the 24th May
' 1815 to the 5th November 1819, the date of Mr Telford's first
' report. And it is ordered and adjudged, that the interlocutors
' complained of, so far as they are inconsistent with these findings,
' be reversed. And it is further ordered, that the cause be re-
' mitted back to the Court of Session, to do in the conjoined pro-
' ceases as shall be consistent with this judgment, and as shall be just.'

LORD GIFFORD.—My Lords, There is a case which stands for judgment, in which a gentleman of the name of John Dixon, Esq. is the appellant, and the Company of Proprietors of the Monkland Navigation are the respondents. The questions brought before your Lordships for consideration are two :—First, Whether, under the terms of an Act of Parliament, (which I shall presently have occasion to state), this Company of proprietors of the Monkland Navigation were entitled, in the year 1815, under that statute which passed in the year 1790, to increase the rates and tolls that had been previously payable upon this navigable canal? And next, if they were not so entitled, whether, under the circumstances which took place in this cause, there was a period at which it was ascertained, by a report of a gentleman of the name of Telford, that the canal was in that state that the Act required, and which would, under that construction of the Act, entitle the Company of proprietors to exact this increased toll from the appellant?

My Lords,—Having stated the questions which arise in this case, I will now call shortly your Lordships' attention to the facts of the case. It appears that in 1770 an Act of Parliament passed to authorize persons to make a navigable canal in the county of Lanark, from a place called Sheepford on the east, to the neighbourhood of the city of Glasgow on the west; and the Act of Parliament authorized this Company ' to make and complete a cut or canal of three feet depth of
' water, navigable and passable for boats, barges, and other vessels, from
' the Monkland collieries in the county of Lanark, beginning at the
' place called Sheepford, in the parish of Old Monkland and county
' aforesaid, by or near the house of Drumpellier, by or near the Well-
' house bleachfield, to or near the city of Glasgow and river of Clyde.'
My Lords, that Act of Parliament enabled the Company to raise the sum of money necessary for that purpose, which is mentioned in the pleadings, and it also authorized them to levy tolls upon goods carried upon the canal. The enactment that allows the tolls to be taken is in these words: ' That in consideration of the great charges and expenses
' that the said Company of proprietors, their successors and assigns,
' will be at in making, maintaining, and supplying with water the said

‘ cut or canal, and road and waggon-way aforesaid, and in making and June 29. 1825.
 ‘ maintaining all the other works hereby authorized to be made and
 ‘ erected, it shall and may be lawful to and for the said Company of
 ‘ proprietors, their successors and assigns, from time to time, and at all
 ‘ times hereafter, to ask, demand, take, and recover, to and for their
 ‘ own proper use and behoof, for tonnage and wharfage, for all coals,
 ‘ stones, timber, and other goods, wares, and merchandises, commodi-
 ‘ ties, and things whatsoever, which shall be navigated, carried, and
 ‘ conveyed upon or through the said cut or canal, such rates and du-
 ‘ ties as the said Company of proprietors, their successors and assigns,
 ‘ shall think fit, not exceeding the sum of one penny sterling money
 ‘ per mile, for every ton of coals, stones, timber, and other goods,
 ‘ wares, merchandises, commodities, and things whatsoever, which
 ‘ shall be navigated, carried, and conveyed upon or through the said
 ‘ cut or canal.’

My Lords,—This canal, it appears, was made, but proved unsucces-
 ful; and in the year 1790, the proprietors of this canal thought it
 would be advantageous for them to make some communication from
 this with another canal called the Forth and Clyde Canal, and that it
 would be advantageous for them to make the whole canal navigable to
 Glasgow, for all boats and other vessels drawing four feet and a half
 of water; along the whole range of the Monkland Navigation, and to
 widen, deepen, and enlarge the same where necessary for that pur-
 pose. The original Act of Parliament only required them to make a
 cut or canal of three feet of depth; but this Act of Parliament enabled
 them to enlarge the canal to make it passable for boats drawing four
 feet and a half of water; and by the 17th section of the second Act of
 Parliament, the proprietors of the Monkland Navigation are authorized
 ‘ to make, complete, and maintain a cut or canal for the purpose of
 ‘ forming a junction between the upper and lower levels of the said
 ‘ Monkland Navigation, at or near a certain place called Blackhill, and
 ‘ to extend the said Monkland Navigation from the east end of the
 ‘ same to Sheepford, in a certain line passing by or near Faskine house
 ‘ to the river Calder, at or near Woodhall or Faskine mill; and to erect,
 ‘ build, repair, and maintain a sufficient number of locks between the
 ‘ different levels of the said canal, to render the same navigable and pas-
 ‘ sable for boats, barges, and other vessels drawing four feet and a half
 ‘ water, along the whole range of the said Monkland Navigation, and to
 ‘ widen, deepen, and enlarge the same where necessary for that pur-
 ‘ pose.’ Then it bears, that the provisions of the former Act are in
 force so far as they can apply to this enlargement. Then there is
 another clause enabling them to raise the requisite sums of money for
 carrying into execution these works; and then, my Lords, by the
 20th section, it is enacted, ‘ That in consideration of the great charges
 ‘ and expenses which will necessarily be incurred by the said Company
 ‘ of proprietors of the said Monkland Navigation, in making, maintain-
 ‘ ing, and supplying with water the said cut or canal, and works con-

June 29. 1825. 'nected therewith, it shall and may be lawful to and for the said
 ' Company of proprietors of the Monkland Navigation, their successors
 ' and assigns, from time to time, and at all times hereafter, to ask, de-
 ' mand, take, and recover, to and for their own proper use and behoof,
 ' for tonnage and wharfage, for all coals, stones, timber, and other
 ' goods, wares, merchandises, commodities, and things whatsoever,
 ' which shall be navigated, carried, or conveyed upon and through the
 ' said cut or canal, such additional rates and duties as the said Com-
 ' pany of proprietors, their successors and assigns, shall, at a general
 ' meeting of the said Company of proprietors, think fit, not exceeding
 ' the sum of 1d. per mile for every ton of coals, stones, timber, dung,
 ' fuel, and other goods; which said rates shall be over and above, and
 ' in addition to, the rates and duties contained in the Act before re-
 ' cited, passed in the tenth year of his present Majesty.'

My Lords,—In consequence of this Act, and with the view of car-
 rying into execution this plan, the Company constructed the necessary
 locks at Blackhill to let down the canal to the level of the Forth and
 Clyde Canal. In the year 1804 they made a regulation with respect
 to these tolls, the effect of which was to produce some increase of tolls;
 but no objection was made by any person at that time to that increase,
 such as it was, and things remained in that state till 1815. My Lords,
 the appellant, Mr Dixon, it appears, was in the habit of using this
 canal for conveying coals; and in the year 1815, (at which time the
 whole concern of this Company was vested in three individuals, gentle-
 men of the name of Stirling), the proprietors called a meeting under
 this Act of Parliament, for the purpose of raising the tolls. Mr Dixon
 protested at that time against the raising of the toll. However, in 1815
 they passed a resolution, by which they raised the tonnage duty to 2d.
 per ton per mile. My Lords, the appellant being dissatisfied with
 this, conceiving they had not completed the canal according to this
 Act of Parliament, by which it was to be made navigable for boats
 drawing four feet and a half of water, he presented to the Court of
 Session a bill of suspension and interdict, praying that it should be
 found that he was not liable to pay this increased duty, because the
 Canal Company had not made this canal navigable for boats drawing
 four feet and a half water. He also raised an action of declarator
 in the Court of Session, which has been joined with this bill of suspen-
 sion and interdict; by which action of declarator he sought to have it
 declared, ' that the said cut or canal not being navigable and passable
 ' for boats and barges drawing four feet and one-half depth of water,
 ' the said Company of proprietors, in imposing and levying tonnage
 ' duties at the rate of 2d. per mile, have exceeded the powers conferred
 ' on them by the foresaid statutes, and are acting in direct contraven-
 ' tion thereof; and that they have no right or title to exact from the
 ' pursuer higher duties than at the rate of 1d. per ton per mile;' that is,
 the rate mentioned in the first Act; and he concluded his summons
 by insisting, that he ought to be repaid the tolls that had been unduly

levied since 1815, he having protested against that advance, and paid it under a reservation of his right to have those sums repaid, in case it should appear that they were unduly levied. June 29. 1825.

The cause came on before Lord Craigie as Lord Ordinary, who pronounced this interlocutor:—‘The Lord Ordinary having heard Counsel for the parties on the reasons of suspension and interdict, of consent allows a declarator at the suspender’s instance to be repeated in the suspension, and conjoins the same herewith; and in the conjoined actions, before answer, appoints the parties to give in a mutual condescendence in terms of the Act of Sederunt.’ My Lords, various proceedings took place, which it is unnecessary for me to state to your Lordships, in the course of this action, with respect to the production and inspection of the books of the Company, upon which no question now arises. Afterwards, it came before the Lord Ordinary upon the merits, when he pronounced this interlocutor on the 26th of February 1818:—‘Having heard parties, considered the Acts of Parliament relative to the Monkland Canal, the mutual condescendence, and whole process, finds, that the Company are in the first instance entitled to levy the duties asked by them; but that, in consequence of their doing so, the pursuer is entitled to reasonable implement of those improvements in the navigation, in consideration of which the exaction of the said duties was authorized by the Legislature; and, before farther answer, grants diligence to both parties for recovery of written evidence, with a view to remit to the Jury Court.’ My Lords, there are then some farther proceedings in the case, and another interlocutor was pronounced by the Lord Ordinary, in which he stated,—‘On considering mutual representations, answers, and whole process, in respect it was not meant by the interlocutor complained of to enforce specific implement, otherwise than as affecting the right of levying dues, and that it will be entire, after the facts in the revised condescendences and answers are ascertained by the verdict of a jury, to which both parties seem at present averse, or otherwise, to pronounce what order may be judged proper as to the rates already levied, or to be levied by the Company; refuses the desire of both representations, and adheres to the interlocutor represented against, and prohibits farther representations in this cause.’

The Monkland Canal Company submitted these interlocutors to the review of the Second Division of the Court of Session in a reclaiming petition, which, on the 27th of November 1818, was appointed to be answered. My Lords, in the course of that proceeding an offer was made on behalf of the proprietors of the Navigation, a minute of which appears in the proceedings; and it is necessary for me to state what that representation on the part of the proprietors of the Monkland Navigation was. ‘That from the date of passing the statute 1790 to the commencement of the present action, the proprietors had expended upon the canal upwards of L.10,000, allowed to be raised by the said Act of Parliament: That since completing the

June 29. 1825. 'extension of the canal to Faskine, and the locks at Blackhill, the
'proprietors had been gradually deepening the canal along its whole
'range, so that at the commencement of the present action the canal
'had been deepened to upwards of four feet six inches.' Now, your
Lordships will recollect, that the Act of Parliament requires, not that it
should be deepened four feet six inches, but that it should be made
navigable for boats drawing four feet six inches; and deepening it to
four feet six inches could not enable boats drawing that depth of water
to navigate it. 'That at present the upper and lower end of the canal
'had been deepened to five feet six inches, and the middle range to
'at least five feet; and the proprietors were in the course of continuing
'to deepen the middle range, so that during the present summer the
'same would be also deepened to five feet six inches, being a depth
'greater than is sufficient to render the same navigable and passable
'for vessels drawing four feet and a half of water, and which must be
'held reasonable implement in terms of the Lord Ordinary's interlo-
'cutor. But to put an end to future discussion regarding this point,
'the proprietors were willing to complete the deepening of the canal
'under the inspection of any eminent engineer to be named by the
'Court, until the engineer shall report that the same is navigable along
'its whole range for vessels drawing four feet and a half of water, in
'terms of the statute; and for this purpose to employ such a number
'of workmen as they shall be directed by the engineer, so as to com-
'plete the same within such time as the engineer shall report to be
'reasonable.' My Lords, on the part of the pursuer, his Counsel an-
swered, 'That the statements about expenditure on the canal were very
'far from being admitted to be correct, and it was in vain for the de-
'fenders to have recourse to such statements so long as they ob-
'stinately refused inspection of their books to the pursuer. If the de-
'fenders,' namely, the proprietors of the Monkland Navigation, 'mean
'bona fide to make and complete the canal in terms of the statute
'1790, the pursuer certainly can have no objection that this shall be
'done, reserving all questions about tonnage dues heretofore unduly
'exactd. But the offer in the minutes is defectively and evasively
'expressed, plainly for no other purpose than to obtain a pretext for
'delay, while the defenders are unduly exacting tonnage dues to which
'they have no right.' My Lords, upon this coming before the Court
of Session, the Court (as indeed the pursuer had himself stated that he
had no objection that the canal should be completed under the direc-
tion of an engineer) directed the Company to complete it under the
inspection of Thomas Telford, Esq. engineer, or, failing him, of Ro-
bert Stevenson, Esq. engineer, until the engineer so inspecting shall
report that 'the same is navigable along the whole range for vessels
'drawing four feet and a half depth of water in terms of the statute,
'and for this purpose ordain such a number of workmen to be employ-
'ed as such engineer shall direct, so as to complete the same within
'such time as the engineer shall report to be reasonable, and the

June 22, 1825.

‘engineer to report thereon to the Court.’ My Lords, the appellant does not appear to have expressed any dissatisfaction as to the reference to Mr Telford or Mr Stevenson, but he suggested that the Court of Session should not only require that Mr Telford should report the same navigable, but that it should be inserted in the interlocutor, ‘to render the same navigable and passable for boats, barges, and other vessels drawing four feet and a half depth of water along the whole range of the said Monkland Navigation, and to deepen and enlarge the same where necessary for that purpose.’ The Court of Session, however, seem not to have acceded to the prayer of that petition, as they left it entirely with Mr Telford to report when it was navigable. According to the terms of the statute, it was part of his duty to see that the canal was rendered substantially navigable along the whole range for vessels drawing four feet six inches of water, and therefore it was not necessary to insert any special directions in the interlocutor.

A petition was then presented, praying their Lordships to alter the last interlocutor; and, first, To find the petitioner entitled to repayment of all tonnage dues paid by him above the rate of one penny per ton per mile, since the 24th May 1815 to the present time, and to allow an interim decree to that effect to go forth. Secondly, To find the petitioner liable for no higher rate of tonnage dues than one penny per ton per mile on any goods whatever conveyed along the Monkland Canal, till the proprietors shall, under the inspection of the engineer named by the Court, deepen and enlarge the canal in terms of the statute 1790. So that your Lordships see the proposition made was not acquiesced in, and the proprietors were to go on deepening the canal until it should be reported capable of being navigated by vessels of that draught by Mr Telford the engineer. My Lords, the Court of Session refused the desire of the petition; and, in the following month of November, it appears Mr Telford, in obedience to this interlocutor, surveyed this canal and reported to the Court:—‘In compliance with the Act of the Lords of Council and Session, (dated 18th May last), on the 3d and 5th days of November instant I inspected the whole of the Monkland Canal, and having passed a vessel loaded to draw four feet six inches of water along the same, and also carefully taken a variety of measurements, I beg leave to report, that, excepting about 100 yards at the upper extremity where the feeder comes in, I found the canal navigable and passable for vessels drawing four feet six inches of water, in terms of the statute, and this was when the water stood level with the top of the top bars of the upper locks at Sheepford and Blackhill, and at five feet six inches upon the upper sills of the upper locks, and the same on the lower sills of the lower locks, at both these places; and I may add, that from the state in which I found the canal, I am of opinion, for a moderate additional expense, it may be made to admit vessels to navigate and pass when loaded to draw four feet nine inches of water.’ My Lords,

June 29. 1825. the appellant, not satisfied with this report, made various objections to it, which are stated in the Cases,—a great number of objections, to the amount, I think, of twenty-two,—I am not certain as to the number. The defenders put in answers to these objections, and the appellant required that their Lordships would either allow a proof by commission, or send to the Jury Court the questions, first, Whether the Monkland Canal is at present fairly, in terms of the statute, navigable and passable for boats drawing four feet and a half of water? and, secondly, At what date this improvement took place, if it had taken place? The Court of Session, however, on the 18th of February 1820, pronounced this interlocutor:—‘ The Lords having resumed consideration of this cause, and proceedings therein, they, before farther answer, again remit to Mr Telford to consider the objections put in to his report, with the answers thereto, together with such farther objections as Mr Dixon may put in, with the answers to the same, and to report his opinion thereon, with such remarks as he may think proper, in an additional report to the Court.’ Mr Telford, in consequence of this, made an additional report, and he reported, ‘ That the whole arrangements respecting the survey were made under my direction, both as regards the keeping up the water, and the sort of boat to be employed; and I objected to either of the parties being present in the survey, as being in my opinion totally unnecessary for ascertaining the objects to which my attention was directed. The keeping the lock-gates shut was the simplest and most certain means of ascertaining what height of water the canal banks would contain. Although the Company’s servant, John Finlay, attended, by my desire, to answer such questions as I found it necessary to put to him, my assistant in taking the dimensions of the canal was Thomas Wilson, a boat-builder, who is no servant to, nor, as I am informed, has ever been employed by the Company, though he has, of course, by the traders. He is merely a tenant upon a twenty-one years’ lease of a piece of ground belonging to the Canal Company; and I myself carefully examined and noted each dimension which was taken. The canal banks were found capable of holding up water when navigated by boats drawing four and a half feet water, and it is the interest of the Company to preserve the canal to the full height. But in the state I found it, it will admit of a couple of inches being drawn down, by a number of boats passing the locks in immediate succession, and still remain navigable for boats drawing four and a half feet of water. The boat I selected, and had loaded and navigated along the canal, drawing four and a half feet of water, was a regular trader, eleven feet two inches in width, which is, I understand, above the general width; and these may in general, and even larger, pass each other; and where narrower places occasionally occur, (as happens in most canals), passing places are formed adjacent, as directed by a clause in the Act. Upon the whole, the Canal Company have, in my opinion, fairly implemented the terms of the

‘statute.’ The appellant again presented a petition to the Court, praying their Lordships to grant an incident diligence at the appellant’s instance, to recover the reports of surveyors on the Monkland Canal ; and to allow him to lodge objections to Mr Telford’s additional report, and a condescendence in terms of the Act of Sederunt. The Court, however, thought that petition irregular, and, on the 23d December 1820, they finally pronounced this interlocutor :—‘ The Lords having resumed consideration of this cause, they before farther answer appoint Mr Dixon to put in a special condescendence, in terms of the Act of Sederunt, of what he avers and offers to prove as to the state and condition of the Monkland Canal, the said condescendence to be put in on or before the box-day in the ensuing Christmas recess, under an amand of forty shillings sterling ; and to allow the other party to put in answers to the said condescendence on or before the first sederunt day in January next.’ After that a condescendence was lodged by the appellant, and answers put in by the defenders. These were not appointed to be revised, but the whole case was advised by their Lordships upon the pleadings as they stood, and this interlocutor was pronounced :—‘ The Lords having resumed consideration of this petition, with the answers thereto, report by Mr Telford, and whole proceedings, in respect there appears to be now sufficient implement on the part of the proprietors of the Monkland Navigation of the completion of the canal in terms of the statute, therefore in the suspension repel the reasons of suspension, find the letters orderly proceeded, and decern ; and in the declarator sustain the defences, assoilzie the defender, and decern : find the petitioners entitled to expenses, subject to modification, and allow an account thereof to be put in, and remit the same when lodged to the auditor of the Court to tax and report.’ My Lords, there was a reclaiming petition presented against that interlocutor, praying the Court of Session ‘ to alter the interlocutor complained of, and first to find the petitioner in hoc statu entitled to repetition of the tonnage dues authorized to be imposed by the Act of 1790, from May 1815 down to the date of Mr Telford’s first report, reserving the petitioner’s claims quoad ultra ; and, secondly, to allow a proof of the facts stated by the petitioner in the condescendence now lodged, and thereafter to proceed as to your Lordships may seem just.’ Then he delivered in a statement of facts, which he requested permission to verify by evidence. The Court having advised this petition with the relative condescendence, and answers to both, adhered to the interlocutors reclaimed against, and refused the desire of the petition : and, by another interlocutor, they modified the amount of the expenses to L.250 sterling, and decerned for payment of that sum.

My Lords,—These interlocutors have been brought before your Lordships ; and you will perceive, in the first instance, the question brought before the Court of Session was, whether or not the Company of proprietors were entitled to the increased rate of toll until they had made

June 20. 1825.

June 23. 1825. the whole cut or canal navigable for boats drawing four feet and a half of water? My Lords, all that Mr Dixon asked by the action was, that he should not be compelled to pay the additional toll till that was done which was the consideration for which the toll was to be exacted. It was quite indifferent to Mr Dixon whether the canal was constructed within the terms of the Act, because, having been in the habit of using the Monkland Canal with small boats, and still using them, and being only subject to a less toll, it was quite indifferent to him whether the canal was enlarged or not. My Lords, the Lord Ordinary seems to have thought, that although the Company were entitled to exact the additional toll, yet that, in consequence of their doing so, Mr Dixon was entitled to have the canal made navigable for boats drawing four feet six inches: that although he had not asked by his action that that should be done, yet the Lord Ordinary, having first determined that they might levy the dues, held, that if they did that, they must also complete the canal—he determined that the pursuer was entitled to reasonable implement of those improvements in the navigation. And he farther states, ‘On considering the mutual representations, answers, and whole process, in respect that it was not meant by the interlocutor complained of to enforce specific implement, otherwise than as affecting the right of levying dues, and it will be entire, after the facts in the revised condescendence and answers are ascertained by the verdict of a jury, to which both parties seem at present averse, or otherwise, to pronounce what order may be judged proper as to the rates already levied or to be levied by the Company.’ Now, I cannot help thinking, that, in that stage of the case, the question simply was this, whether, in the state of things, the Company of proprietors had a right to demand this toll? If not, Mr Dixon was entitled to his suspension. If they had the right to demand it, then the suspension was to be refused. Mr Dixon did not ask that this canal should be enlarged. It seems to me rather a singular mode of proceeding in this action, which did not ask for an enlargement of the canal, that the enlargement of the canal should be directed. But then, the question afterwards arises, whether, upon the fair construction of this Act of Parliament, and the contract the Company had entered into, they were entitled to demand this toll till they had done what was the consideration for doing it, namely, making this canal (which was then navigable only for boats drawing three feet water) navigable for boats drawing four feet and a half. Now, it is important to consider what the Act is which they have obtained, and what they ask power from the Legislature to do. They come to Parliament and say, that it would be desirable to form this junction between the Monkland Canal Navigation and the Forth and Clyde Canal, and to render the whole range of the Monkland Navigation navigable and passable for boats, barges, and other vessels drawing four feet and a half water. And, my Lords, powers are granted to them under the Act to enable them to make it a canal navigable for boats of that size; also a power is given to them

June 29. 1886.

to raise money for this purpose ; and then comes the clause that enables them to raise the tolls, and that clause is, ' that in consideration of the great charges and expenses that will be incurred by the Company in making, maintaining, and supplying with water the said cut or canal, and works connected therewith, it shall and will be lawful to and for the said Company of proprietors *hereafter*'—and that is the only word upon which it is contended they have a right to demand the toll—' *hereafter* to ask, demand, take, and recover, to and for their own proper use and behoof, for tonnage and wharfage, for all coals, stones, timber, and other goods, wares, merchandises, and other things conveyed upon or through the said cut or canal, such additional rates and duties as the said Company of proprietors shall, at a general meeting of the said Company of proprietors, think fit, not exceeding the sum of 1d. sterling a mile for every ton of coals, stones, timber,' and so on. Now, what the Canal Company contended is, that at any moment after the Act passed—although their conduct forms a strong comment upon what they conceived their power under the Act was—they say, immediately after this Act passed, they had a right to exact from all boats navigating this canal an additional penny per ton, if they chose at a meeting to declare they meant to raise it, although they had not at that time done any thing towards making the canal navigable for large boats ; and although the boats thus navigating could only use the old canal, for which they were to pay a penny, yet, before they could derive any advantage from navigating this canal by boats of increased burden, they say, they were to pay this additional penny a-ton, to enable the Company to widen this canal ; and they say they have that right, because the word ' *hereafter* ' occurred in the former Act :—' That in consideration of the great charges and expenses which the said Company will be at in making the canal and other works, it shall and may be lawful to and for the said Company of proprietors from time to time, and at all times *hereafter*, to ask, demand, take, and recover the tonnage upon all goods which shall be navigated, carried, and conveyed upon or through the said cut or canal, such rates and duties as the said Company of proprietors shall think fit, not exceeding the sum of one penny per mile, for every ton of coals and other goods which shall be navigated, carried, and conveyed upon or through the said cut or canal.' Could it be contended, under the first Act of Parliament, that till they had made the canal they could demand the toll ? The toll was to be paid for goods navigating the canal ; they could not pay it till the canal was cut ; but after the passing of this Act, and after the work was done, they would be liable, and so they would be under the second Act. The second Act authorized them to increase the toll, because they were to make the canal navigable for boats of a larger burden ; therefore, upon the construction of this Act of Parliament, upon the agreement I formed a very strong opinion, and I have had an opportunity of considering it since the case was argued ; and it appears to me, that the considera-

June 29. 1825. tion for the increased toll was, the rendering the canal navigable for boats of this description, and till they had done so, they had no right to demand these tolls. The Lord Ordinary's interlocutor is a little singular; he thinks they should make the canal navigable, but he thinks they may demand the toll first. Upon the construction of the Act of Parliament, I am of opinion, and submit to your Lordships, that this is the fair construction of this contract entered into by the Company, strongly strengthened by their own conduct, (if it was necessary to have recourse to it), that they had no right to demand this increased toll till the canal was rendered substantially navigable. It was argued here, that if the House was of that opinion, they would have no right to demand this toll, until the very last spadé of earth had been dug to render it completely navigable. But you must look and see whether the substantial part of the contract has been performed on their part. You may put extreme cases on both sides. You may demand the tolls before you begin to work at all; and on the other hand, you may say that you must not take it till the work is complete. I say you must look and see whether the contract has been substantially performed; and my opinion is, that they have no right to demand this increased toll till the canal was substantially completed.

Then comes the question of what is to be done with this long and expensive proceeding. An offer was made on the part of the Monkland Navigation, to complete the navigation for vessels of four feet and a half. It appears quite evident, the papers shew it, that at the time of the commencement of the action, the canal was not navigable, within the terms of the Act of Parliament, for boats drawing four feet and a half of water; but as the Lord Ordinary had said it ought to be improved to that extent, they offer that it shall be done, that they will be subject to the report of Mr Telford on the subject. Now, did Mr Dixon, or not, acquiesce in that? My Lords, that he acquiesced in the appointment of Mr Telford by the Court, and made no objection at the time, I think is quite clear; but he reserved his right to be repaid his tolls till the canal was completed. He says, I have no objection that it shall be done under the inspection of Mr Telford. My Lords, the whole proceeding at the time shews he had no objection to that remit to Mr Telford; but he thought that in that remit to Mr Telford he should be tied down more particularly than he was as to the manner in which the canal should be constructed. The Court said it should be left to Mr Telford; and he agreed that it should be carried on under the inspection of an engineer, who was to make a report. He only prays, 'That the petitioner shall be found liable for 'no higher rate of tonnage dues than one penny per ton per mile on 'any goods whatsoever conveyed along the Monkland Canal, until the 'Company shall, under the inspection of the engineer named by the 'Court,—agreeing, therefore, that it should be done under the inspection of that engineer,—'deepen and enlarge the canal in terms of the 'Act.' I think, therefore, upon this proceeding, it must be taken,

that Mr Dixon did acquiesce at that time that the canal should be inspected, and the alterations superintended by Mr Telford. Then Mr Telford made his report; and in both reports he was of opinion, that the Company had substantially and fairly, in his judgment, in November 1819, rendered the canal navigable and passable for boats drawing four feet six inches water. He is of opinion, that the Canal Company had fairly implemented the terms of the statute. June 29. 1825.

My Lords,—In Scotland, as in England, I apprehend, that where parties consent that a thing shall be done on the judgment of a particular individual, he must be bound by that consent; and therefore it appears to me, that Mr Dixon, the appellant, must be bound by the judgment of Mr Telford. I think your Lordships must consider, under the circumstances of this case, from what passed at the time of the proposition on the part of the Monkland Canal Company that Mr Telford, the engineer, should superintend the work, Mr Dixon consenting to abide by any person appointed by the Court,—as no objection was taken to Mr Telford, and as no objection was taken to the proposition that he should inspect and report, that therefore it must be taken that he consented to be bound by it. He has reported, and there seems no fair reason to quarrel with that report, that in the month of November 1819 this canal was navigable for boats within the terms of the Act of Parliament, which, as against Mr Dixon, seems conclusive upon the point. But the Court of Session have done that which, consistently with the opinion I have expressed to your Lordships, I do not think can stand. They have adjudged Mr Dixon to pay all these increased tolls, from the time they were demanded in 1815, without any regard to the period of time at which the canal was rendered navigable; and they have fixed, that Mr Dixon is to pay the expenses of the suit. In my view of it, Mr Dixon was entitled to a suspension when he brought his action; because the canal was not in that state to enable them to demand the increased tolls. They agree to put it in that state, and it is put in that state. At the date of the report the Court were of opinion, that, it being then completed, the Monkland Navigation had a right to all these tolls from Mr Dixon, from 1815 down to the period when they found the canal was completed. This, certainly, is a perplexing case—I mean as to proceedings which have for so long a period taken place in the Court of Session. It is extremely unfortunate that Mr Dixon did not bring that decision of the Lord Ordinary under review of this House; but having acquiesced in the appointment of Mr Telford, it was too late to consider what might have been done by the House in that state of it, if it had been brought before your Lordships under those circumstances. It appears to me, that all your Lordships can do on this occasion is in your judgment to express what your opinion is upon the construction of this Act of Parliament, and your opinion as to the conduct of the appellant with respect to this remit to Mr Telford; and having thus expressed your opinion, that the cause should be remitted to the Court

June 29. 1823. of Session to apply your Lordships' judgment to its proceedings. I should propose to your Lordships to find, ' that the respondents were ' not entitled to demand any additional rates or duties for tonnage of ' goods conveyed upon the cut or canal in the said interlocutors mentioned, under and by virtue of the statute made and passed in the ' thirtieth year of the reign of his late Majesty, until the said cut or ' canal had been rendered navigable and passable for boats, barges, ' and other vessels drawing four feet and one-half depth of water: and ' the Lords farther find, that, with the acquiescence of the appellant, ' the Lords of Session directed the deepening of the said cut or canal ' should be completed by the proprietors, under the inspection of ' Thomas Telford, Esq. engineer, and failing of him, of Robert Stevenson, Esq. engineer, until the engineer so inspecting should report the ' same was navigable along the whole range for vessels drawing four ' and a half feet depth of water, in terms of the statute: and the Lords ' farther find, that from the report of the said Thomas Telford, so appointed as aforesaid, dated the 5th of November 1819, and from his ' additional report, dated the 17th of April 1820, it appears, that in ' his judgment the said cut or canal was navigable and passable for ' vessels drawing four feet six inches of water, in terms of the statute, ' and that the Canal Company had fairly implemented the terms of the ' statute: and the Lords farther find, that, under the circumstances, ' the appellant is entitled to repetition of the additional rates and ' duties demanded from and paid by him, from the 24th day of May ' 1815 to the 5th of November 1819, the date of Mr Telford's first ' report;' to reverse the interlocutors so far as they are inconsistent with this finding, and to remit to the Court of Session to apply this finding to the proceedings. It appears to me, upon the construction of the Act of Parliament, that this arrives at the substantial justice in the case between the parties. I think Mr Dixon entitled to be relieved from the additional toll till Mr Telford reported that the canal was navigable for vessels of this description. As to Mr Dixon and the Canal Company, it appears to me that that is the only mode in which, with reference to the proceedings and the Act of Parliament, your Lordships can properly deal with the case; therefore I should propose to adopt the language I have read to your Lordships, and to remit the cause to the Court of Session, with these findings, to apply them to the case. That places Mr Dixon in this situation, that he would be entitled to call upon the Canal Company for the repayment of those tolls and dues which were improperly taken from him till Mr Telford so reported the canal to be completed.

Appellants' Authorities.—1. Com. Dig. voce Parl. B. 7. § 2. 247.; Guild, Dec. 21. 1809, (F. C.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

WILLIAM FORBES, Esq. and Tutors, Appellants.

No. 56.

JOHN LIVINGSTONE, Esq. and his Tutor, Respondents.

Prescription.—Question raised, but remitted for reconsideration, Whether a party had a sufficient title and possession to acquire a prescriptive right to coal?

THE Earls of Linlithgow and Callendar were proprietors of the barony of Haining, and in the seventeenth century they feued out to the predecessor of the respondent, Mr Livingstone, Parkhall and certain other parcels of the barony, and by a separate charter the lands of Whiterig, which also formed part of the barony of Haining, but under a reservation of the coal and limestone, expressed in these or similar words:—‘Exceptand and ‘reservand to the said Earl, and his foresaids, liberty and privilege to win coal and limestone, making of shanks, &c. within ‘any part of the said lands, for payment to the said Alexander ‘Livingstone and his foresaids of what skaith or loss they shall ‘sustain upon their arable land thereby, exceptand always to ‘the said Alexander and his foresaids to win limestaine within ‘any part of the said lands, to their own use allenarly.’ The estates of the Earls of Linlithgow and Callendar having been forfeited to the Crown, on the attainder of the then Earl for his accession to the rebellion of 1715, Livingstone of Parkhall applied to the Barons of Exchequer for a Crown-charter of the lands held by him as vassal of the Earl of Linlithgow and Callendar, under the Clan Act, (1st Geo. I. c. 20.), which provided that vassals holding lands and tenements of the superiors who should be convicted of treason, but who themselves should continue in dutiful allegiance to King George, should be entitled to hold ‘such lands and tenements’ of the Crown; and which empowered the Court of Exchequer, on production of the superior’s attainder, to pass signatures ‘in favour of such vassal or vassals ‘of the said lands or tenements above-mentioned respectively.’

The Barons of Exchequer accordingly granted to Livingstone, in 1716, a charter under the Great Seal, which proceeded on the narrative of the above-mentioned Act of Parliament, and in virtue thereof granted de novo in one charter, and for payment of a single nominal reddendo, the several parcels of land previously held feu of the attainted Earl, but without any reservation of the coal, the grant being in the usual general terms of lands with their pertinents. On this charter Livingstone was infeft in 1735, and the successive investitures of the family were

June 29. 1825.

2D DIVISION.
Lords Newton
and Craigie.

June 29. 1825. renewed in the same terms. On the other hand, the forfeited estates of the Earl of Linlithgow and Callendar were vested in the Parliamentary Commissioners for the management of forfeited estates; and by them the barony of Haining was sold, in 1720, to the York Buildings Company, who were infeft in 1748, and whose titles, it was admitted, were sufficient to carry the reserved coal under the lands feued to the Livingstone family. The right to this barony was subsequently acquired, at the judicial sale of the York Buildings Company estates, by the appellant's ancestor, Mr Forbes of Callendar. Both parties continued in the uninterrupted possession of the surface of their respective properties; but it was admitted that the appellant's predecessors had never attempted to work coal under Mr Livingstone's lands, although they had done so on their own part of the barony of Haining; while, on the other hand, it appeared from the proof subsequently led in the cause, that about the year 1756 coals had been worked by Mr Livingstone's predecessors, to a trifling extent, with pick-axes, in a place called Tappuckstone, situated on the parcel of lands called Parkhall, where it was evident coals had formerly been taken, and near which was the appearance of an old level; but there was no evidence as to whether the old working had been carried on prior or subsequent to the Crown-charter obtained by the Livingstone family. It further appeared, that the workings about 1756 had been stopped by the overflowing of water, and that they had been resumed about 1785, and were carried on for three years, during which time the late Mr Forbes of Callendar had got coals from the pits for the supply of his family. A third set of workings commenced about the same time, and were carried on, with short intervals, till about 1796, in the lands of Whiterig, which had been originally feued out separately from the other parcels, but were included along with them in the Crown-charter of 1716; and it further appeared, that the predecessors of the respondent had been in use in their leases to insert a reservation of their right to dig coal.

In 1809 the late Mr Livingstone, father of the respondent, having again commenced to work the coal under his lands of Parkhall, &c. Mr Forbes, the appellant's father, brought an action to have it declared that he had an exclusive right to the coal, in virtue of his titles derived through the York Buildings Company from the Earls of Callendar and Linlithgow, and to have Mr Livingstone ordained to desist from working it in all time coming; and Mr Livingstone raised a counter action of

June 23. 1825.

declarator of his right. These two processes having been con-
 joined, and Mr Livingstone having founded a plea of prescrip-
 tion on the possession of the surface alone, the Lord Ordinary,
 (the late Lord Newton), 'in respect Mr Livingstone has not
 'condescended on acts of possession of coal within the lands
 'libelled on for forty years past, and that it was decided in the
 'case between the lessees of the York Buildings Company and
 'one of Mr Livingstone's predecessors, both in this Court and
 'the House of Lords, that a charter similar to that here founded
 'on was not sufficient to carry the coal in the lands of Madiston,
 'without actual possession of the coal, as contradistinguished
 'from the lands,' decerned against Livingstone in the action at
 Forbes's instance, and in the counter action assoilzied. Lord
 Craigie afterwards adhered by an interlocutor, in which he found,
 'that by the charter granted in 1716 by the Barons of Exche-
 'quer in Scotland to the representer (Livingstone's) predeces-
 'sors, (in pursuance of the Act 1st Geo. I. statute 2. chap. 20.
 'usually termed the Clan Act), though conceived in unlimited
 'terms, no greater or more extensive right to the coal or lime-
 'stone could be granted, than had been formerly competent to
 'the representer's predecessors,—the only purpose of such char-
 'ter being to enable the representer's predecessors to hold of the
 'Crown those lands which they formerly held as vassals of the
 'Earls of Linlithgow and Callendar: That the whole of the
 'feudal property and rights which in 1715 belonged to the Earl
 'of Linlithgow and Callendar, who was attainted in that year,
 'including the right to the coal and limestone to be found on
 'the lands already mentioned, having been vested in Parliamen-
 'tary Commissioners, were by them sold to the York Buildings
 'Company, and thereafter, by a decree of sale obtained by cre-
 'ditors of the Company, transmitted to the respondent: That in
 'virtue of the reservation of the coal and limestone in the ori-
 'ginal feu-rights already mentioned, these minerals continued a
 'part of the estate belonging to the granters, as much as if no
 'feu-rights had been granted, and consequently that the pro-
 'perty thereof could not be lost by the negative prescription:
 'That though the charter obtained from the Barons of Exchequer
 'in 1716, combined with those which followed, and which are
 'in the same terms, might afford a proper title of prescription,
 'whereupon the representer (Livingstone) and his predecessors
 'might have acquired right to the coal and limestone in ques-
 'tion, the representer has not proved, or offered to prove, pos-
 'session such as to establish a prescriptive right; therefore, as
 'well as in respect of the precedent in the case of Madiston or

June 29. 1825. 'Craigend, mentioned in the interlocutor of the former Lord 'Ordinary,' his Lordship refused the representation, and adhered to the interlocutor represented against.

Mr Livingstone then reclaimed, and, after a first petition had been refused, offered a proof of possession of the coal, which having been allowed, a proof was led which established the facts above narrated. The Court, on the 24th May 1821, found, 'that Mr Livingstone has proved that he and his predecessors 'have had sufficient possession in the lands of Tappuck or Tappuckstone to support a prescriptive title.' And on the 31st January 1822 they adhered, and found, that these lands formed part of those comprehended in the Crown-charter 1716 in favour of Livingstone's predecessors, and therefore assoilzied him.* In the meanwhile both parties died, whereupon their respective sons and their guardians were sisted in their place.

Mr Forbes and his guardians having appealed, and contended, 1st, That the title founded on by Livingstone was not available so as to acquire a prescriptive right to the coal; and, 2d, That supposing it were so, there had been no prescriptive possession,—the House of Lords ordered, 'that the cause be 'remitted back to the Court of Session, to review generally the 'interlocutors complained of; and, in reviewing the same, the 'Court is especially to consider whether the respondent has produced a sufficient title on which prescription can be founded, 'and whether the acts of possession, and taking of the coal in 'Tappuck or Tappuckstone, and Whiterig, respectively, in proof 'in the cause, are sufficient to establish a title by prescription in 'the respondent to the coal under the lands of Nicolton, Weetshot, Hillside, Gilmeadowland, and Parkhall, and under the 'lands of Whiterig, or any of them: And it is further ordered, 'that the Court to which this remit is made do require the 'opinion of the Judges of the other Division, in the matters and 'questions of law in this case, in writing, which Judges of the 'other Division are to give and communicate the same; and 'after so reviewing the interlocutors complained of, the said 'Court do and decern in this cause as may be just.†

LORD GIFFORD.—The next case which stands before your Lordships for judgment is one of very great importance—perhaps of as great importance as any that has occurred in discussion before your

* See 1. Shaw and Ballantine, No. 322.

† See 6. Shaw and Dunlop, p. 167. for the result of the remit.

Lordships in the course of the present Session, as it affects the law of Scotland. It is the case of *Forbes v. Livingstone*. June 29. 1825.

My Lords,—The great question in this cause was, whether, under certain titles acquired by the predecessor of the respondent Mr Livingstone, and by certain acts of enjoyment with respect to coal found under certain land, he had acquired by positive prescription a right to the coal; or whether the appellants, having originally a preferable right to those coals, have, under the circumstances I shall state to your Lordships, lost that right, in consequence of the acquisition of it by prescription in the respondents.

My Lords,—It appears that the Earls of Linlithgow and Callendar were proprietors of certain lands in the baronies of Almond and Haining in the county of Stirling. In the seventeenth century they feued out various portions of this estate to the predecessors of Mr Livingstone of Parkhall. These feus comprehended various parcels of land known by different names, Nicolton, Weetshot, Hillside or Hillhead, Gilmeadowland, Parkhall, Rowantreeyard, &c.; and it appeared, in granting these feus the family of Callendar reserved a right to win coal and limestone within the feu. The reservation was contained in general in the following terms:—‘Exceptand and reservand always to the said Earl and his foresaids liberty and privilege to win coal and lymestone, making of shanks, casting of holes and sinks, and making of wayes and passages thereto, within any part of the said lands, for payment to the said Alexander Livingstone and his foresaids of what skaith or loss they shall susteane upon their arable land thereby, at the sight of two honest men, one to be chosen by the said noble Earl, and another by the said Alexander.’ My Lords, an exception occurred in all the grants other than that of Rowantreeyard, to which that reservation did not apply, and I may dismiss from your Lordships’ consideration any thing relating to that parcel of land called Rowantreeyard, that question being determined by an interlocutor in this cause, with respect to which there is no appeal.

My Lords,—The matter thus stood in 1715; the right to coal, as I have stated to your Lordships, remaining in the Earls of Linlithgow and Callendar, and the right to the surface in the feuar. When, in 1715, the Earl of Callendar and Linlithgow forfeited his estates in consequence of being engaged in the rebellion at that time, his estates were escheated to the Crown, and in that escheat were comprised the property of the barony of Almond, with all its parts and pertinents, and, among the rest, the right to the coal in the lands belonging to Mr Livingstone.

My Lords,—It may be known to your Lordships, that in the year 1715, in consequence of the state of Scotland, an Act was passed, commonly called the Clan Act, which Act of Parliament was for the purpose of encouraging all superiors, vassals, landlords, and tenants, who do and shall continue in their duty and loyalty to his Majesty King George, and for discouraging all superiors, vassals, landlords, and tenants there,

June 29. 1825.

who have been or shall be guilty of rebellious practices against his said Majesty. By that Act it was enacted, that every vassal who shall continue peaceable and in dutiful allegiance, holding lands or tenements of any such offender who holds such lands or tenements immediately of the Crown, shall be vested and seized, and are hereby enacted and ordained to hold the said lands or tenements of his Majesty, his heirs and successors, in fee and heritage for ever, by such manner of holding as any such offender held such lands or tenements of the Crown at the time of the attainder of such offender; so that your Lordships see the object of this was, that a vassal should no longer hold of a superior who had rebelled against his Majesty, but that he should hold the lands immediately of the Crown, according to the same manner of holding as the superior had previously held those lands: and in order to carry that measure into effect, the Court of Exchequer in Scotland were directed, on production of any such attainder, to revise, compound, and pass signatures, and that without paying any composition, in favour of every such vassal or vassals, and his heir or their heirs, of the said lands and tenements above-mentioned respectively, to be holden of his Majesty, his heirs and successors, in fee and heritage for ever, and by such holding as is above-mentioned. Your Lordships perceive, therefore, the only authority vested in the Court of Exchequer in Scotland, with respect to this Act of Parliament, was, that where a vassal had previously held his lands of an attainted superior, he should hold the same lands immediately of his Majesty.

My Lords,—In consequence of that, Mr Livingstone, the then proprietor of these lands, in 1716, availed himself of the provision of this Act, and applied to the Court of Exchequer for a grant of the lands of Nicolson, Weetshot, Hillhead, Gilmeadowland, and Parkhall, which he held of his attainted superior the Earl of Callendar, and he accordingly obtained a charter. But, my Lords, in that charter, so granted under this Clan Act, there was no express reservation of the coals under this land, which had been reserved to the Earls of Callendar when they had granted a feu, but which right to coals was escheated to the Crown in consequence of the attainder; but the grant, which was obtained from the Court of Exchequer, describes these lands particularly, and you have the general words, conveying all the parts and pertinents belonging to these lands to Mr Livingstone. The charter is printed in these papers, and it grants to him all these lands, portions of the barony of Haining, called Nicolson, Weetshot, Hillhead, Gilmeadowland, and Parkhall, with the houses, edifices, and the usual words: it then adds, ‘as those lands were then possessed and ‘occupied by Alexander Livingstone and his servants:’ it then grants him all the lands of Rowantreeyards, with respect to which there is no question in this cause; then it grants him all the lands and houses, with the parts, pendicles, and pertinents of the same, and other lands; and which lands, they say, belonged to Alexander Livingstone, and

were held by him of James, late Earl of Linlithgow and Callendar, who June 29. 1825. held the same immediately of the Crown.

My Lords,—This charter being granted, it appears that afterwards the York Buildings Company purchased from the Crown the right to the barony of Haining, which belonged to the Earls of Callendar and Linlithgow; and your Lordships will find that is settled by an interdictor, against which there is no appeal; and under a conveyance from the Crown to the York Buildings Company, and afterwards from them to the ancestors of the appellants, the coal under these lands was clearly conveyed.

It appears, my Lords, that somewhere about 1809 or 1810, coals being about to be dug, or having been dug by Mr Livingstone under a part of these lands, a question arose, whether he had a right to those coals, or whether Mr Forbes, who, as I have said, derived a title under a conveyance from the York Buildings Company, was entitled to those coals; and, in order to bring this question to a decision, Mr Forbes brought an action of declarator in the Court of Session, in which he libelled on the terms and conditions of the feu-right granted to the respondent's ancestors by the Earls of Callendar; on the right since acquired by the York Buildings Company, and afterwards by the late Mr Forbes, to all the reserved property of coals, lime, and limestone, in the appellant's lands, which formerly belonged to the families of Callendar and Linlithgow; and, lastly, on the judgment of the Court of Session, and of this honourable House, as to the reserved right of coal in the lands of Craighend. The summons concluded, 'that the defender should exhibit the feu-charters, contracts, or other grants of lands, and the various subsequent titles and investitures thereof; and that it should be found and declared, that the pursuer, his heirs and successors, had the only good and undoubted right and title to the whole coal, lime, and limestone, in the foresaid lands of Nicolton and others before-mentioned.'

My Lords,—Another action of declarator was brought by Mr Livingstone, a cross action, in which he sought to have it found, 'that the coal in the said lands is the sole and peculiar property of the said pursuer, and that he and his predecessors and authors have not only been in the continual and uninterrupted possession and use of the coal contained in the said lands, as a pertinent thereof, from the year 1716, but also by secluding and debarring all other persons therefrom.' Your Lordships find defences were put in by Mr Livingstone to Mr Forbes's action, by which he contended, that he had an undoubted right to the coal under the original feu-rights. It was contended, they were sufficient to carry the coal; and whatever may have been the import of the reservation contained in the other feu-rights, the defender's ancestors were entitled, in virtue of the Clan Act, to have right to their lands free from any burden in the person of their superior. Then he went on to contend, that the charter of 1716, to which I have called your Lordships' attention, contained no reser-

June 29. 1825.

vation ;—the defender, in virtue of his sasine, and the possession which followed upon it, has a prescriptive right to the lands and pertinents, comprehending the coal, free from any reservation or other burden than is contained in that charter.

The case came on before the Lord Ordinary in 1810, and he pronounced this interlocutor: ' Assoillies the defender Mr Livingstone, ' as far as concerns the lands of Rowantreeyards, from the conclusions of the libel at Mr Forbes's instance.' As I have stated to your Lordships, there was no original reservation of coal under that land; and it was admitted, that as to that there could be no question as to the right of Mr Livingstone to get coals out of it. The interlocutor then proceeds, ' And before answer as to the other lands, appoints ' the defender, Mr Livingstone, to give in a condescendence of the facts ' and circumstances he offers to prove, both as to his title and possession, and that against next calling.' A condescendence was accordingly given in for Mr Livingstone, which was followed by answers; and the Lord Ordinary upon that pronounces this interlocutor: ' In respect ' Mr Livingstone has not condescended on acts of possession of the coal ' within the lands libelled on for forty years past, and that it was decided in the case between the lessees of the York Buildings Company, ' and one of Mr Livingstone's predecessors, both in this Court and the ' House of Lords, that a charter similar to that here founded on was ' not sufficient to carry the coal in the lands of Madiston without actual possession of the coal, as contradistinguished from the ' lands in the process of declarator at Mr Forbes's instance, decerns ' against Mr Livingstone, conform to the conclusions of the libel, except as to the coal lying in Rowantreeyards, with respect to which ' Mr Livingstone was assoillied by a former interlocutor now final; and ' in the declarator at Mr Livingstone's instance against Mr Forbes, ' assoillies Mr Forbes from the conclusions of the libel, under the foresaid exception within the Rowantreeyards.' My Lords, a short representation was given in against this interlocutor, which was refused by Lord Newton; but a full representation having afterwards been given in for Mr Livingstone, it was followed with answers for Mr Forbes. But Lord Newton having died in the mean time, the processes were remitted to Lord Craigie, who, upon the 21st of December, pronounced this interlocutor: ' Having considered the process, ' and particularly the representation for the defender, and answers ' thereto, with the remit of the Court, and writings produced hinc ' inde, Finds the lands mentioned in the pleadings were feued out in ' the seventeenth century by the Earls of Linlithgow and Callendar to ' the representer's predecessors, reserving to the granters the liberty ' and privilege of digging and winning coal, lime, and limestone, upon ' payment of surface damages, and with liberty to the feuars to win ' limestone for their own use only: Finds, that by the charter granted ' in 1716 by the Barons of Exchequer in Scotland to the representer's ' predecessors, though conceived in unlimited terms, no greater or

June 29. 1825.

‘more extensive right to the coal or limestone could be granted, or was intended to be granted, than had been formerly competent to the representer’s predecessors,—the only purpose of such charter being to enable the representer’s predecessors to hold of the Crown those lands which he formerly held as the vassal of the Earls of Linlithgow and Callendar: Finds, that the whole of the feudal property and rights which in 1715 belonged to the Earl of Linlithgow and Callendar, who was attainted in that year, including the right to the coal and limestone to be found in the lands already mentioned, having been vested in Parliamentary Commissioners, were by them sold to the York Buildings Company, and thereafter, by a decree of sale obtained by the creditors of the Company, transmitted to the respondent.’ Your Lordships therefore perceive, by this finding, Lord Craigie finds, ‘That the feudal rights of that property which in 1715 belonged to the Earl of Linlithgow and Callendar, who was attainted in that year, including the right to the coal, having been vested in Commissioners, were by them sold to the York Buildings Company, and thereafter, by a decree of sale obtained by the creditors of the Company, transmitted to the respondent: Finds, that in virtue of the reservation of the coal and limestone in the original feu-rights already mentioned, these minerals continued a part of the estate belonging to the granters, as much as if no feu-rights had been granted, and consequently that the property thereof could not be lost by the negative prescription: Finds, that though the charter obtained from the Barons of Exchequer in 1716, combined with those which followed, and which are in the same terms, might afford a proper title of prescription, whereupon the representer and his predecessors might have acquired right to the coal and limestone in question, the representer has not proved, nor offered to prove possession, such as to establish a prescriptive right. Therefore, as well as in respect of the precedent in the case of Madiston or Craigend, mentioned in the interlocutor of the former Lord Ordinary, refuses the representation, and adheres to the interlocutor represented against; and as the merits of the question have been already very fully stated on both sides, prohibits any further representation.’ A short petition was afterwards lodged against this interlocutor, praying for leave to lodge an additional petition; which being granted by the Court below, a full petition was accordingly lodged; upon considering which, with the answers, their Lordships, on the 27th of May 1812, superseded advising thereof, until a hearing in presence took place on the points at issue. Such a hearing took place accordingly, and, after a full discussion, the following interlocutor was pronounced: ‘The Lords having resumed consideration of this petition, and advised the same, with the additional petition and answers thereto, and whole process, and heard Counsel thereon in their own presence, adhere to the interlocutor reclaimed against, and refuse the desire of the petition.’ At this stage of the cause, as far as the titles were concerned, it is clear the right to the

June 29, 1825.

coal by this interlocutor had passed to the predecessors of Mr Forbes the respondent, and therefore that, under the charter of 1716 alone, Mr Livingstone had no title to the coal; but in as much as the Lord Ordinary found that that charter might afford a proper title of prescription whereupon Mr Livingstone and his predecessors might acquire a right, Mr Livingstone put in a petition, praying that he might be admitted to prove the acts of possession that had taken place by his ancestors as to these coals. The petition was given in by Mr Livingstone in the month of February 1813, in which it was stated, 'It was with the view of affording some explanations with regard to the actual possession of the minerals themselves upon the estate of Parkhall that the petitioner's Counsel moved their Lordships for permission to lodge a minute, or a short additional petition, to embrace what he had to state upon that subject, suggested by one of the conclusions of Mr Forbes's summons, so that an answer might be made at the same time to both petitions;' and after stating various facts and circumstances regarding the working of the coal by the petitioner and his predecessors, the additional petition prayed their Lordships, inter alia, before answer, to allow the petitioner a proof of his actual possession of the coal in question; and in the month of March a petition was presented to examine some old persons, for fear of their evidence being lost; and a condescendence was put in, in terms of the Act of Sederunt, of the facts which he averred and offered to prove with regard to the possession of the coal in question; and in the month of July the following interlocutor was pronounced by the Court below: 'The Lords having advised the condescendence and answers, allow the defender to prove the facts set forth in his condescendence, as explained by the prefixed minute; allow the pursuer a proof of the facts set forth in his answers; and allow to both parties a conjunct probation, and grant commission to the Sheriff-depute of Stirlingshire to take the proof.'

My Lords,—In consequence of that, the evidence was taken. Afterwards Mr Forbes died, and Mr Livingstone also dying, for some time no proceedings were taken in the cause. However, the cause was afterwards revived, or, in the language of the law of Scotland, awakened; and in the month of May 1821 this interlocutor was pronounced: 'Having resumed consideration of the petition of Mr Livingstone of Parkhall, with the answers of Mr Forbes of Callendar, and advised the same, with the condescendence, answers, writs produced, proof adduced, prepared state, mutual memorials, and heard the Counsel for the parties viva voce; find, that Mr Livingstone has proved that he and his predecessors have had sufficient possession of the coal in the lands of Tappuck or Tappuckstone to support a prescriptive title; but, before further answer to this article, appoint the party to give in memorials on this question, whether Tappuck or Tappuckstone is a part of the lands granted to Mr Livingstone's predecessors in the charter of 1716, or make part of the lands which Mr Livingstone and his predecessors have continued to hold by

June 29. 1823.

‘ charters from Mr Forbes and his authors, containing a reservation of
 ‘ the coal to the superiors, or of any other lands, neither contained in
 ‘ the charters 1716, nor in the charters from Mr Forbes, or his
 ‘ authors.’ My Lords, a petition against this interlocutor was lodged
 by the appellant, which was followed by answers for the respondent,
 and memorials; and, finally, this interlocutor was pronounced: ‘ The
 ‘ Lords having resumed consideration of this petition, and advised
 ‘ the same, with the answers, mutual memorials for the parties, and
 ‘ former proceedings, and heard the Counsel viva voce, refuse the pe-
 ‘ tition, and adhere to the interlocutor complained of: Find, that
 ‘ the lands of Tappuck or Tappuckstone make part of the lands
 ‘ comprehended in the Crown-charter anno 1716, in favour of the de-
 ‘ fender’s predecessors: Therefore sustain the defences, and assoilzie
 ‘ the defender from the conclusions of the libel: Find no expenses
 ‘ due to either party, and decern.’ My Lords, that interlocutor was
 submitted to the Court for review, and they pronounced an inter-
 locutor on the 1st of February 1822; and by that interlocutor your
 Lordships find, that they sustain Mr Livingstone’s right to the coals in
 the land in question, in consequence of the acts of possession he has
 proved within the place called Tappuckstone.

Now, two questions have been agitated in this cause; first, Whether
 the charter 1716 afforded a sufficient title, with the infestment that
 followed upon it, to Mr Livingstone’s predecessors, upon which to
 found a title by prescription? And next, assuming that that was suf-
 ficient, Whether the acts of possession which Mr Livingstone has
 proved by the evidence, to which I shall presently call your attention,
 was sufficient to establish a title by prescription to this coal, the pre-
 ferable title being decided to have been originally in the appellant’s
 predecessors.

My Lords,—The question upon the law of prescription turns upon
 the terms of the statute of 1617, which introduces the prescription. By
 that Act it is enacted, That ‘ whomsoever of his Majesty’s lieges,
 ‘ their predecessors and authors, have bruiked heretofore, or shall
 ‘ happen to bruik in time coming, by themselves, their tenants, and
 ‘ others having their rights, their lands, baronies, annualrents, and other
 ‘ heritages, by virtue of their heritable infestments made to them by
 ‘ his Majesty or others, their superiors and authors, for the space of
 ‘ forty years continually and together following and ensuing the date
 ‘ of their said infestments, and that peaceably, without any lawful in-
 ‘ terruption made to them therein during the said space of forty years,
 ‘ that such persons, their heirs and successors, shall never be troubled,
 ‘ pursued, nor inquieted in the heritable right and property of
 ‘ their said land and heritages foresaid by his Majesty or others, their
 ‘ superiors and authors, their heirs and successors, nor by any other
 ‘ person pretending right to the same, by virtue of prior infestments,
 ‘ public or private, nor upon no other ground, reason, or argument
 ‘ competent of law, except for falsehood, providing they be able to

June 29. 1825. 'show and produce a charter of the said lands and others forecalds, 'granted to them or their predecessors by their saids superiors and 'authors, preceding the entry of the saids forty years' possession, with 'the instruments of sasine following thereupon.' Now, my Lords, it is contended on the part of Mr Livingstone, that the charter of 1716, granted to him by the Barons of the Exchequer in pursuance of the Clan Act, containing no reservation of coal, but purporting to convey to him all those lands, with every thing belonging to them, though they might have exceeded their powers in granting that charter, still it purported to grant it to him, and was a sufficient right upon which they could found their title by prescription, supposing they could show enjoyment for the period prescribed by the Act. On the other hand it was contended, that the Clan Act enacted this only, that the vassal, instead of holding what he held of his attainted superior, should hold the same subject-matter of the Crown; and that, therefore, all the authority of the Barons of the Exchequer was to grant to the vassal that which he had held, to be held in future of the Crown, instead of being held, in this instance, of the Earl of Callendar. The charter itself so expresses it—describes the lands that were then possessed by Mr Livingstone; and therefore it was said, this was not a sufficient title to found a right to prescription.

Now it is said on the other hand, that this question came before this House, in the case of Madiston, in 1772. I apprehend that case did not decide the question either way: there had been no act of possession; it was a question whether the charter obtained from the Barons of the Exchequer under the Clan Act did or did not give a right by prescription? But, there being no act of possession, there could be no title. Although there was much reasoning, it does not appear that the Court below pronounced any definitive opinion upon the subject. I observe, in the first interlocutor of the Lord Ordinary, he considered the case of the York Buildings Company a precedent,—that a charter similar to that here founded on was not sufficient to carry the coal in the lands of Madiston without actual possession. Undoubtedly it was there argued, that without actual possession no title by prescription is to be acquired; but it does not appear to me, in looking at the reasons of this case, or the interlocutor, that any definite opinion was given whether the charter alone was or not sufficient. Lord Craigie thinks this charter might afford a title by prescription. Upon this point I should observe, that the Court below, who differed upon the other question, appear to have entertained no difference of opinion as to the sufficiency of the charter to found a prescription; the difference that existed turned upon the acts of possession that were proved on the part of Mr Livingstone. As to these acts of possession, it appears that they took place at three different periods. The earliest period was about the year 1762, or thereabouts.

My Lords,—The acts of possession on the part of Mr Livingstone's predecessors at that time were two. The first was proved by a person of

the name of Margaret Anderson : she stated, that about fifty years before she was examined, she bore coals in the lands of Tappuck ; and she speaks to the taking of coal by persons of the name of Sneddons, in a place called Tappuck, or Tappuckstone, part of these feued lands ; that they were taken by those persons, and that some remuneration was paid to Mr Livingstone for the taking of those coals ; and it appears that continued for some considerable space of time,—she speaks for five or six weeks, other witnesses speak for a longer period. My Lords, your Lordships perceive that took place, I think we may say about the year 1763,—in other instances about 1756 or 1757. The working at that time does not appear to have been very considerable ; they dug with pick-axes, and they dug in an old place, where it was evident that coals had been formerly taken : but when those coals were formerly taken, you have no evidence at all ; whether anterior to 1716, or subsequent to it, no evidence at all was given ; but there was the appearance of an old working. Your Lordships will perceive, a working before 1716 would have no effect upon the question, provided the charter was sufficient to found a prescription.

My Lords,—After that time there was a cessation of any working for thirty or forty years. The second working of Tappuckstone did not take place till 1785. There was an interval of more than thirty years up to 1785 before any other workings took place ; they are spoken to by a person of the name of Ferguson ; they were begun by Andrew Rae and James Beg. The workings on that occasion are much more considerable than they were in the period I have first mentioned, and continued for a considerable time,—three years ; and they attempt to shew, that during that time coals from those workings were purchased by the servants of Mr Forbes. Whether they were taken from the workings under these feu-lands, or whether they were taken from the workings under a place called Burnside, which has no bearing upon this case, may admit of some question ; but it is attempted to be shewn, not only that those workings went on for a considerable time, but that they must be known to Mr Forbes, who lived in the neighbourhood ; and that his servants fetched coals from there. That shews that the workings must have excited the attention of those who had a claim to them, which Mr Forbes had, under the title from the York Buildings Company.

There is a third set of workings spoken of in Whiterig,—they are proved to have been about twenty-six years before the examination, by a person of the name of Alexander Sneddon. I mention this, because no distinction is made in the interlocutor pronounced as to the other lands contained in the charter in 1716 ; but, anterior to that, Whiterig had been held under a distinct charter from the other lands which formed the Parkhall lands generally, but having different names. Now, Tappuckstone formed a part of the Parkhall estate, and though there was a question at one time in the cause, whether it did form a part or not, it appears satisfactory evidence was given to the Court below ;

June 29. 1825.

June 29. 1825. shewing that Tappuckstone did form a part of the Parkhall estate. Now, in addition to that, they produce certain tacks granted by Mr Livingstone's predecessors, in which there is a reservation of the right of coal. But, my Lords, those contracts between him and his tenants do not seem to me very materially to affect the rights of a third person in whom the right of coal is vested; it is a secret contract between him and his tenant, and the party claiming to be interested cannot be considered as bound by any such act.

And here I must observe, that I cannot but regret upon these questions of fact, that a more satisfactory mode has not been taken to ascertain the facts; but whatever your Lordships' judgment may be in this case, it would be unjust to the respondent now, supposing your Lordships were of opinion that these acts that appear upon the evidence are not sufficient to satisfy you that the party gained a title by prescription, if further inquiry was requisite, perhaps it would be unjust to the respondent, considering the ages of those witnesses, to proceed to the other mode of taking evidence. Then the question comes, whether these are such continuous acts of enjoyment for forty years as come within the meaning of the statute of 1617? Now, with reference to the acts of enjoyment, they must be considered with reference to the subject-matter; it is not to be expected, that if the question is, who is entitled to coal? that you can prove the use, *de die in diem*, for forty years. On the other hand, the question is, whether these, which are but slight acts of ownership, at the distance of four or five years, were such as to bring to the notice of the other party what was doing as to his right of coal, so as to call upon him to interfere to prevent the exercise of that right by another? And then when, with reference to that, you find an interval of upwards of thirty years, (speaking in round numbers), when there is a cessation of any act of enjoyment for that period, and when it is resumed, whether you will connect those two acts of possession so as to say, if the first shews the possession, being an act adverse to the right of the other party, it shall be considered as continuing, to the party exercising the right, the possession of the coal from that time to the subsequent working, when he again exercises the right.

My Lords,—Upon this question, as I have stated to your Lordships, great difference of opinion existed in the Court below; and I believe I may venture to state, that there is no subject of greater importance in the law of Scotland than the subject of a title by prescription: it is that upon which many of their titles depend; and therefore it is of the utmost importance that your Lordships should, before you venture to decide on such a question, have all the information you can from the legal authorities of the country. Upon this case I regret again, as I have had to repeat more than once, that in a case of so much importance in point of value and principle, when great difference of opinion existed in one Division of the Court, I cannot but regret that they did not avail themselves of obtaining the opinions of the

other Division ; because, if the differences of opinion still existed, you would have the advantage of knowing what the collective opinion of the sages of the law of Scotland was upon the point, which is a point of such infinite importance as affecting the law of prescription there. June 29. 1824.

My Lords,—In this case I think, that this should be considered not merely as to the value of the property, (which is very large I understand from the argument at your Lordships' Bar), but where the questions of law are of such importance, I humbly submit to your Lordships in this case, that your Lordships should send it back to have the opinion of all the Judges upon the application of the principles of law to this case; and although there has been the unanimous opinion of the Court as to the charter of 1716, I should propose that that question, as well as the other, should be reconsidered. If the Judges of the other Division concur with the Judges of the Second Division, that there is no doubt that that charter gave a title to found a prescription, you will have their collected opinion: but, even supposing they are of that opinion, then comes the important question, whether the acts of possession have been proved; and if it was of a more recent date, and an inquiry by issue could be obtained, I should recommend it to the Court to direct an issue; but I feel a difficulty as to an issue on account of those old witnesses who were examined many years back; their evidence may be lost; and as the Court have acted upon this evidence, which is not very long, I have not detained your Lordships by going through it, wishing that it should be further considered, and not wishing to express any opinion that can or ought in any manner to affect the judgment of the Court below; but the evidence is not very voluminous, and therefore it will be very easily read and understood by those learned persons, to whom I propose that this cause should be remitted. It appears to me that the question under the charter of 1716 is still open, and the inference may be drawn one way or the other; I will not say to which side it ought to be drawn. It seems to be the opinion of Lord Newton and Lord Craigie that that was a sufficient title, and the Court have concurred in that view of the case; and therefore I should propose to remit this cause to the Court of Session, in order that we may have the benefit of the united and collected opinions of the Judges of both Divisions on the question.

Before I conclude, I should humbly suggest to your Lordships that it should be communicated to the Court below, that in this interlocutor no distinction is made between Whiterig and Parkhall lands. It may be that the Court considered that the acts of possession, whether under distinct rights or not, were sufficient to carry coals under the whole land. As to Whiterig, there is only one act of enjoyment proved, but no distinction is made between the lands of Whiterig and the other lands; but, as I collect the opinion of the Court, it was this, that having sufficiently proved acts of possession of Tappuck or Tappuckstone, which formed part of Parkhall land, that that gave Mr Livingstone a right to coal under the whole of the lands comprized in

June 29. 1825. the charter of 1716. It may be important that the Court of Session should have an opportunity of considering, whether they mean to draw any distinction between the one set of lands and the other. I would propose to remit this for the Court to consider, whether the respondent has produced a sufficient title on which prescription can be founded; and whether the acts of possession and taking the coal in Tappuck or Tappuckstone, and Whiterig, respectively, in proof in the cause, are sufficient to establish a title by prescription in the respondent to the coals under the lands of Nicolton, Weetshot, Hillaide, Gilmeadowland, and Parkhall, and under the lands of Whiterig, or any of them; and it is farther ordered, that the Court to which this remit is made do require the opinion of the Judges of the other Division upon the matters and questions of law in this cause in writing, which the Judges of the other Division are to give, and communicate the same; and after so reviewing the interlocutors complained of, the said Court do decern in this cause as may be just. In reviewing their interlocutors, if, in their judgment, they think any distinction can properly be made, that question will be quite open to them; and when the matter comes before your Lordships again, we shall know the opinion of all the Judges of the Court of Scotland as to prescription to coal under land, the surface of which belongs to another person, and whether that right of coal was lost by positive prescription or enjoyment. I propose to your Lordships to remit the cause with the directions I have stated.

J. CHALMER—J. RICHARDSON,—Solicitors.

No. 57. LIEUTENANT-GENERAL MONCREIFF, Appellant and Respondent.

PATRICK GEORGE SKENE, Esq. Respondent and Appellant.

Relief—Heir and Executor—Clause—Legacy.—1. A party having executed an entail of an estate in favour of a certain series of heirs, declaring that the heirs should be bound 'to pay and perform all debts payable and prestable by me or my ancestors, and every other claim and demand to which the said lands and others, or any part thereof, are now, or may happen by law to be subjected or made liable;' and also, unico contextu, a general disposition of the estates of which he should die possessed in favour of the same heirs, under a declaration, that 'the real and personal estate hereby conveyed is and shall be burdened with the payment of all my just and lawful debts;' and the succession to the entailed and unentailed properties having afterwards gone to different parties;—Held, in a question between them, (reversing the judgment of the Court of Session), That the two estates were liable in relief pro rata of a debt constituted by the granter over them both. And, 2. A legacy having been left by the granter of the above deeds, payable by one of the heirs and his representatives, in case of his succeeding to the estates; and he not having succeeded, and his representative having only got a part of the succession, while the other part went to the legatee;—Held, (reversing the judgment of the Court of Session), That the legacy was not exigible.

GENERAL ROBERT SKENE of Pitlour or Hallyards, in the county of Fife, entered into a transaction with the Duke of Athole for the purchase of the estate of Falkland at the price of L.16,000, but which, in consequence of his death, was not completed. He was succeeded by his brother, General Philip Skene, who, on the 10th of August 1787, executed two different deeds, the one being an entail of the estate of Pitlour or Hallyards, and other lands of which he was then in possession, and the other being a deed of settlement in relation to all the other property and effects of which he should die possessed. Both of these deeds were made in favour of himself, and the heirs of his body; whom failing, to Captain David Skene of the 28th regiment of foot, some time inspector of military roads in Scotland, his brother-german; whom failing, to David Skene, son of Captain David Skene, and the heirs of his body; whom failing, to Mrs Helen Skene, alias Moncreiff, his sister, relict of Colonel George Moncreiff of Redie; whom failing, to Patrick Moncreiff, Esq. of Redie, and the heirs of his body; whom failing, to a series of substitutes therein named. The entail contained the usual clauses, with a power of alteration and revocation, and a declaration that the heir succeeding to the lands should be bound 'to pay and perform all debts payable and prescutable by me or my ancestors, and every other claim and demand to which the said lands and others, or any part thereof, are now, or may happen by law to be subjected or made liable.' In the deed of settlement there was this clause,—'Reserving to me, not only my liferent use of the whole subjects hereby disposed, but also full power and liberty, at any time of my life, et etiam in articulo mortis, to alter or revoke these presents, in whole or in part, as I shall think proper; providing always that the real and personal estate hereby conveyed is and shall be burdened with the payment of all my just and lawful debts, and the charges of my funeral, and also with the payment of any legacies that I may think fit to legate and bequeath to any person or persons; under which express burdens and provisions these presents are granted by me.'

The transaction with the Duke of Athole was thereafter completed by General Philip, and a disposition of the estate of Falkland was executed in his favour on the 12th of October 1787, and the price paid, and the deed delivered, in November. In order to pay the price, General Philip borrowed L.16,000 from Sir Hector Monro, for which he granted an heritable bond over

June 29. 1825.

2d DIVISION.
Lord Roston.

June 29. 1825.

his whole estates, including both Pitlour and Falkland, on which infestment was taken.

In February 1788 he made the following codicil :—‘ Where-
 ‘ as by my will, my estates, real and personal, will fall to my
 ‘ brother David, and his heirs, and whereas, on failure of the
 ‘ heirs of his son, my nephew Patrick Moncreiff of Redie will
 ‘ succeed to the said property, now I do hereby direct, that in
 ‘ case the said Patrick Moncreiff, my nephew, does succeed to
 ‘ the said property, it is my will and orders, that he does imme-
 ‘ diately, on such succession taking place, pay over to his brother,
 ‘ Captain George Moncreiff, of the 11th regiment of foot, the
 ‘ sum of L. 4000, for the purpose of promoting him in the line
 ‘ of his profession, or at his own option; and that he likewise
 ‘ release, acquit, and discharge him of and from all and every debt
 ‘ which now is or may be due by the said Captain George Mon-
 ‘ creiff to his said brother, Patrick Moncreiff of Redie; and it
 ‘ is my will and orders, that this codicil may be equally binding
 ‘ upon the heirs, executors, and administrators of my nephew,
 ‘ Patrick Moncreiff, as it is upon himself.’ His brother David
 died in March; and in June thereafter the General himself died
 at Dijon. David left an infant son, who succeeded, in virtue of
 the above titles, both to the entailed and unentailed properties;
 but he died in 1803 without issue. He was succeeded by his
 aunt, Mrs Helen Moncreiff, sister of the General, and widow
 of Colonel Moncreiff of Redie, who thereupon assumed the name
 of Skene, and made up titles under the respective deeds to the
 entailed and unentailed properties. Her eldest son, Patrick,
 died, leaving a son, the respondent Patrick George Skene, and
 she having a second son, the appellant General Moncreiff, she
 executed a mortis causa disposition in his favour of the estate of
 Falkland, of all the other unentailed property, and of her move-
 able effects. She died in 1816, whereupon the respondent suc-
 ceeded to the entailed estate, and the appellant to that of Falk-
 land, &c.

Two questions then arose between them,—1st, Whether the
 entailed estate was liable for a share of the heritable bond in
 favour of Sir Hector Monro, or whether the whole burden fell
 upon the unentailed property? and, 2d, Whether, as Patrick
 Moncreiff had not succeeded to the estates, and the succession
 had not been allowed to take place as provided by General Skene,
 the appellant was entitled to demand payment of the legacy in
 terms of the codicil from the respondent, as the heir of his father
 Patrick? To settle these questions the respondent brought an

action, concluding, 1st, That the appellant should be ordained to relieve the entailed estate of all the heritable debts and burdens by which it was affected; and, 2dly, That it should be declared that the appellant had no right to insist for payment of the legacy. June 29. 1895.

Lord Reston pronounced this interlocutor: ' Finds, that the entail and relative disposition executed by General Philip Skene, both of the same date, are to be considered as parts of the same general settlement: Finds, that *ex figura verborum*, as well as by the evident intention of the grantor, his debts were to be paid out of the subjects conveyed by the disposition, without relief from the entailed property: Finds, that though the heritable bond granted to Sir Hector Monro, after the settlement, extends over both for the benefit of the creditor, this makes no alteration on General Skene's succession under the deeds which regulate the payment of his debts as at his death: Finds, that the late Mrs Helen Skene, having taken up both the entailed and unentailed property, was bound to relieve the entailed estate of the bond in question, and that that burden now devolves on the defender, as her gratuitous donee; and decerns and declares accordingly: But finds, that by the second codicil executed by General Skene, the pursuer, in case of his succeeding under the general settlement, the event which has happened, was bound to pay the defender L. 4000 sterling, and also to discharge the debts due by the defender to his (the pursuer's) father: Finds, that this obligation does not depend on the value of the unentailed property to be inherited by him, so that as, if the late Mrs Skene's debts had exhausted said property, the codicil would still have been effectual, it cannot be lapsed from her exerting any faculty competent to her under the settlement; and therefore finds the defender entitled to the benefit of said codicil, and so far absolves him from the present action, and decerns: To this judgment the Court adhered on advising two reclaiming petitions, with answers, on the 4th of December 1818, and 13th of February 1820.*

Both parties appealed,—General Moncreiff in regard to the heritable burden, and Mr Skene as to the legacy.

*Appellant, (General Moncreiff).—*1. Although by the law of Scotland a creditor is entitled to recover his debt from any part of his debtor's estate, whether heritable or moveable, yet in ques-

June 29. 1825. tions of succession, and inter heredes, the debts are distributed into classes, affecting, according to their nature, one or other portion of the estate, and leaving the rest unaffected. Thus, an executor may be compelled to pay an heritable debt to the creditor, but he is entitled to relief from the heir; and, on the other hand, if the heir pay a personal debt, he has relief from the executor. A similar rule applies to heritable debts secured on different portions of the defunct's heritage, descendible to different classes of heirs. The respective estates are regarded in relation to the creditor as joint and several debtors, so that he may exact payment either from the one or the other, or from both; but in a question of relief, as between the two estates, they must contribute pro rata. This rule receives effect in every case where the ancestor has not, either by express words or a clear manifestation of will, excluded the right of relief; and therefore the question here is, Whether there is any such expressed or implied exclusion? It is admitted that there is no such express clause; and both the entail and the deed of settlement contain an obligation, that the respective heirs succeeding shall be bound to pay the debts of the granter. So far, therefore, from there being any clear manifestation that the whole debts were to be exacted from the unentailed property, there is an express declaration that the whole estates shall be jointly liable; and therefore effect must be given to the rule in law relative to the right of relief.

2. By the codicil it was declared, not only that the obligation to pay the legacy and discharge the debts due by the appellant to Patrick should be imposed on Patrick; but that it should be equally binding upon his heirs, executors, and administrators, and therefore it must be effectual against the respondent as his representative. It is no doubt true, that the respondent had not succeeded to the unentailed lands; but there was no condition to that effect in the codicil; or at least the condition there mentioned must have been intended to have had reference to the entailed succession to the property, seeing that there was no certainty that the respondent could succeed to that which was unentailed.

Respondent, (Mr Skene.)—1. The plain object of General Skene, when he unico contextu executed the entail and disposition, was, that his entailed property should be taken free and unencumbered, and that the debts affecting it should be paid out of his other funds. Accordingly, the obligation inserted in the deed of settlement was, that the property should be chargeable with 'all his just and lawful debts;' whereas that in the entail was merely to pay those 'to which the said lands and others, or

June 29. 1825.

'any part thereof, are now, or may happen by law to be subject-
'ed or made liable.' It is plain, therefore, that what he meant
was, that while the heirs of entail should be bound to pay those
debts for which the estate might 'by law' be affected at the suit of
any creditor, yet that his unentailed estates should ultimately be
liable, and bound to relieve the entailed property. Indeed, any
other construction would be inconsistent with the fundamental
principle on which an entail is executed, which is to perpetuate
the succession of a particular estate; for if the debts were to be
thrown upon it, then that succession would to a great extent be
defeated. Although, therefore, the general rules laid down by the
appellant were well founded, they would have no application to
the present case.

2. It is manifest, that when General Skene executed the codi-
cil, he contemplated that the succession, both to his entailed and
unentailed property, was to vest either in Patrick or in the re-
spondent, and on that supposition he made the provision for the
appellant. But the respondent has been deprived of a very valu-
able part of the succession, and therefore it is impossible that,
consistently with the testator's will, the appellant can be found
entitled to the legacy.

The House of Lords pronounced this judgment:—'The Lords
'find, that the appellant is not bound to relieve the entailed es-
'tate of the debt of L. 16,000, with interest, but that such debt
'ought to be borne and paid by the respondent and the appel-
'lant, rateably, and in proportion to the several estates charged
'therewith: And the Lords further find, that, in the events
'which have happened, the bequest of L. 4000 is not exigible or
'demandable from the appellant in the cross appeal; nor is he
'bound to release and discharge the debts due at the date of the
'codicil, or since, from the respondent to the father of the said
'appellant in the cross appeal: And it is therefore ordered and
'adjudged, that the interlocutors complained of in the said ap-
'peals, so far as they are inconsistent with these findings, be re-
'versed: And it is further ordered, that the cause be remitted
'back to the Court of Session to proceed further therein accord-
'ing to this judgment, and as shall be just.'

Appellant's Authorities.—(1.) Carnousie, July 22. 1630, (5204.); 3. Stair, 5. 18.; 3.
Ersk. 7. 52.; Drammond, June 7. 1798, (4478.); Rose, Jan. 17. 1786, (5229.
reversed April 2. 1787); 3. Ersk. 3. 48.; Russell, Jan. 23. 1745, (5211.);
Fraser, Nov. 13. 1804, (No. 3. App. Heir and Ex., affirmed July 20. 1812);
Cruise Dig. 167.; 3. Aitk. Rep. 201.; 1. Bro. Rep. 262.; 9. Vea. Junior, 453.;
Carr, July 19. 1751, (Elch. No. 41. Taillie.)

A. MUNDELL—J. CHALMER,—Solicitors.

No. 58.

EARL of MINTO, Appellant.

SIR WILLIAM F. ELLIOT, Bart., Respondent.

Implied Will—Relief—Heir and Executor.—Circumstances under which a Scotchman, having sold a part of his landed estate, and invested a portion of the price in the public funds, and intimated to an heritable creditor in London his intention of paying the debt in six months; but having died before the expiration of that period, and consequently before payment;—*Found*, (affirming the judgment of the Court of Session), That the deceased's residuary legatee was bound to free and relieve the landed estate, and the heir of entail, of that heritable debt.

June 29. 1825.

2D DIVISION.
Lord Pitmilley.

THE late Right Honourable William Elliot of Wells, born, educated, and domiciled in Scotland, had succeeded to, and purchased considerable landed estates in the county of Roxburgh. He entailed the baronies of Hadden and Ormiston in favour of himself, and the heirs-male of his body, whom failing, in favour of certain other substitutes, binding and obliging himself, and his heirs-at-law, and his executors and successors, to free and relieve the entailed lands, and the heirs of tailie who should succeed thereto, of all debts to which the entailer should be liable at the time of his death; reserving power, at any time of his life, and even on deathbed, not only to alter the order and course of succession as to the heirs of tailie, and to revoke or alter all or any of the conditions, provisions, &c. but to sell, alienate, &c.; declaring, however, that no revocation or alteration should be inferred by implication or construction, but only from an express writing under his hand, or under the hand of a person duly authorized. Of the same date, and on the narrative of having executed the deed of entail, he executed a general trust conveyance of all his lands and effects, heritable and moveable, wherever situated, with power to borrow money, and to sell the unentailed property, and also the baronies of Hadden and Ormiston, if the trustees should find it necessary, for payment of his debts, and for the other purposes of the trust. These purposes were, 1st, Payment of deathbed and funeral expenses, expense of executing the trust, and recording the deed of entail. 2d, Payment of an annuity of L. 400 per annum to the heir of entail in possession for the time, till the expiry of the trust. 3d, Payment of all just and lawful debts then due and owing by the testator, or which should be due and owing by him at the time of his death. 4th, Payment of legacies. 5th, Redemption of the land-tax. 6th, The purchase of the teinds of the barony of Hadden. To prevent the trust lands from being either unnecessarily, or under disadvantageous circumstances,

brought to sale, full discretionary powers were granted to the trustees to determine at all times as to the propriety of bringing them to sale; and if the sale should be judged necessary, to delay and postpone the same for a longer or shorter period, as they should see proper, 'it being my wish that the said lands and others, which my said trustees are hereby allowed to sell, especially the barony of Hadden, may not be sold, in case my trustees shall be of opinion that my debts, and the other burdens which may affect this trust, can by degrees be paid off from the surplus rents of the estate, and other funds, in a longer or a shorter time, without any considerable inconvenience,' &c.

June 29. 1825.

Thereafter, in December 1809, Mr Elliot executed a supplementary deed, which inter alia limited the annuity of L. 400 to L. 100; and, 'I do, In order that my said trustees may be the better enabled to satisfy and pay such debts as shall be owing by me at the time of my death; as also the legacies and annuities as I may hereafter appoint to be paid; and, in general, that they may be enabled the more speedily to accomplish the purposes of the said trust, without having recourse to a sale of that part of my entailed estate which, by the said trust-deed, is allowed to be sold, or any part thereof; as it is my most earnest wish and desire, and which, though expressed in the said trust-deed, I here anxiously repeat, that the said debts and others may be gradually satisfied and extinguished out of the rents and profits of my said entailed estate, and any other funds falling under the said trust; and that a sale of any part of my said entailed estate allowed to be sold, if it can without great inconvenience and disadvantage be avoided, may not take place; but at the same time always giving to my said trustees full discretionary powers of judging and acting in this matter as to them shall seem fit.' He then grants certain legacies, and proceeds thus:—'And whereas I am possessed of certain funds and effects situated in England, which I may dispose of by a deed in the English form, therefore I hereby declare, that any such deed executed by me, and unrevoked at my death, shall carry right to said funds and effects situated in England, so far as thereby conveyed, settled, or bequeathed; and the same shall not be held or considered as falling under my aforesaid trust-deed.' And he concludes by ratifying the original trust-disposition. Accordingly, in 1816, he made a will in the English form, in which, after certain special legacies, there follows this clause:—'All my books, and whatsoever other property and effects I may die possessed of in England, I give and

June 29. 1825. 'bequeath unto the Right Honourable Gilbert Earl of Minto, (on condition of paying certain additional legacies); and I do hereby appoint the said Gilbert Earl of Minto, and Ambrose Glover, executors of this my last will and testament; and I also confirm the entail and trust-deed by me already made of my Scotch estate, and of my property in that part of Great Britain called Scotland.'

Mr Elliot was due to the late Arthur Balfour L. 15,000, by heritable bond over Ormiston and Hadden, (payable in London), and which now vested in the person of John Crawford Balfour of Portland-place. Another sum of L. 5000 was due to Sir Robert Preston. In 1818 Mr Elliot sold the estate of Ormiston to Mr Mein for L. 28,000, of which L. 16,000 was, at Mr Elliot's desire, remitted to London; and the correspondence which took place shews, that his object was to pay off the bond debt due to Balfour. Thus in June 1818 he wrote Mr Ker,—' Upon due consideration of all the circumstances of the case, and of Messrs Brodie and Imlach's opinion, I will take L. 28,000 for Ormiston, provided Mr Mein defrays half the expense of the conveyance, and consents to pay the whole or L. 16,000 of the purchase-money in London.' This condition Mr Elliot repeated to his agent Mr Brodie. Mr Mein's man of business accepted the offer, (1st July), observing, ' Mr Mein will remit to Mr Elliot's banker in London, as ' part of the price of the lands, in fourteen days, ' L. 16,000.' Of the same date Mr Brodie wrote Mr Elliot, ' By ' the offer you will observe Mr Mein is to pay L. 16,000 of the price ' in London, within fourteen days of this date; and he proposes to ' pay the remainder at any time he may find convenient for himself ' by Martinmas first, by instalments of L. 1000. I presume you ' mean to apply the L. 16,000 in payment of Mr Balfour's bond, ' in which case it will be proper, in case a bargain is concluded ' with Mr Mein, to give immediate intimation to Mr Balfour.' In answer, Mr Elliot wrote,—' As it was understood between Mr ' Balfour and myself that he was to have six months' notice ' whenever it might be my intention to discharge his mortgage, ' I shall lose no time in making the intimation whenever I hear ' from you that the bargain with Mr Mein is finally settled. You ' will recollect that Ormiston is part of Mr Balfour's security; ' but I suppose that this circumstance will not impede the progress of the disposition, and my final adjustment with Mr Mein. ' If the sale is settled on, I wish the L. 16,000 to be placed to ' my credit in the hands of Messrs Drummonds, Charing-cross. ' When this is done, I shall have to consider in what manner I

June 29, 1825.

‘ shall most profitably employ the money until the period arrives for the payment of Mr Balfour, to whom, in the mean time, I am to give five per cent interest. The question will be, whether I had better vest it in the Stocks, or in Exchequer bills, or in the Bank of the British Linen Company, who, as Mr Ker tells me, continue to take money at four per cent. I shall consult Drummond on this point; but perhaps you may be able to furnish me with useful counsel on it.’ Mr Brodie wrote in answer, 6th July,—‘ Mr Gray having been from home for these two days past, it was only this morning that I finally fixed with him about the purchase of Ormiston; and I now enclose a copy of his letter, agreeing to the payment of the price in the way proposed by you. Although Mr Balfour’s security extends over Ormiston, it will not impede the final settlement with Mr Mein at the term of Martinmas, when he will get a disposition, as I have no doubt he will be perfectly satisfied with your obligatory letter, engaging to relieve the lands of that burden between and the term of Candlemas next. Mr Mein is to write to his agents in London by to-morrow’s post, to place the L.16,000 to your credit in the hands of Messrs Drummonds, bankers. I do not consider myself qualified to give you advice about the most beneficial mode of investing the money; but I would prefer the three per cents, were it my own.’ Mr Ker, factor of Mr Elliot, wrote to Mr Brodie, (July 8.)—‘ I noticed in your letter to Mr Elliot, that you recommend his investing the L.16,000, paid by Mr Mein into Drummonds’ house, in the funds. It occurs to me, that it might turn out eventually as profitable, or more so, if lodged in the British Linen Company, provided they still give four per cent, as in that event there would be a premium in drawing it from London; and though upon remitting it again six months hence would cause a discount, still, as investing in the funds is gambling, and to avoid risk of a decline there, please give me your sentiments upon this.’ On the same day Mr Elliot wrote to Mr Brodie,—‘ I trouble you with a line merely to say, that under the circumstances stated in your communication of the 6th instant, I wish you to give immediate notice to Sir Robert Preston of my intention of paying his mortgage at the expiry of six months from the period of your intimation, if you think you cannot sooner discharge it.’ On the 14th Mr Mein wrote, that he had ordered the money to be remitted, according to notice, through the British Linen Company. It was so remitted; but having been placed by Drummonds, bankers, to account with Mr Mein, it was at the desire of

June 29, 1835. Mr Elliot transferred to his credit. As soon as Mr Elliot saw that the transaction was concluded, he had (6th July) written to Mr Balfour,—‘ Having, by a recent sale of land, enabled myself to
 ‘ liquidate some of the encumbrances with which my property
 ‘ stands at present charged, I feel it incumbent on me to take the
 ‘ earliest opportunity of apprizing you, that it will be necessary
 ‘ for me, with a view to an adjustment of my affairs, to pay the
 ‘ amount of your mortgage at the expiration of six months from
 ‘ the date of this letter.’ Mr Balfour answered,—‘ I have the honour to acknowledge receipt of your letter of the 6th instant,
 ‘ informing me that it is your intention to pay up your mortgage
 ‘ at the expiration of six months from the date of that letter.
 ‘ However much I may regret this communication on account of
 ‘ those interested, it is satisfactory for me to know, that it is in
 ‘ consequence of arrangements consistent with your interest.’ Thereafter a draft of a discharge of the heritable security was prepared, but Mr Elliot died before it was executed, and within the six months, having a few days before signed the disposition to Mr Mein. Previous to this event Mr Elliot had vested the L.16,000 in the three per cent Cons. Ann.

Mr Mein was desirous of having Ormiston freed of the burden, but Mr Balfour refusing to restrict his security, a Mr Ainslie advanced the money, took a conveyance to the debt, and restricted his security to the other lands burdened along with Ormiston; and thus Mr Mein held Ormiston disencumbered.

A question now arose between Lord Minto, the executor under the English will, and the trustees in Mr Elliot’s trust-deed and Sir William F. Elliot, the heir of entail in the Scotch estates. Sir William filed a bill in Chancery, for the purpose of getting the money in the funds transferred to him; but no judgment was pronounced, the Vice-Chancellor having intimated an opinion, that the question was one which ought to be tried under the law of Scotland, and before a Scotch Court. Lord Minto then brought an action against the trustees and Sir William in the Court of Session, concluding ‘ that neither the trustees under the foresaid
 ‘ deed of trust, and other settlements relative to the testator’s
 ‘ Scotch property, nor the heirs of entail under the foresaid deed
 ‘ of taillie of Wells and others, have any right or interest in or
 ‘ to the said property or funds which belonged to the testator at
 ‘ the period of his decease, and situated or lodged in England, the
 ‘ same, by the aforesaid declaration contained in the said supplementary settlement, being specially exempted from the operation
 ‘ of the said trust-deed: and it ought further to be found and de-

‘ clared, that the said trustees qua such, and the said heir of entail
 ‘ to the estate of Wells and others, and that the Scotch estates
 ‘ and funds to which they have right respectively, are liable to
 ‘ free and relieve the pursuer and the said English succession of
 ‘ and from the payment of all debts, legacies and annuities, due
 ‘ and bequeathed by the testator, and which by the said Scotch
 ‘ settlements, as well as from certain of them being burdens on
 ‘ the Scotch estates, or annuities having respect to a tract of
 ‘ future time, fall by law to be paid without relief from the Scotch
 ‘ estates and funds there.’ Sir William raised a counter action,
 concluding that the sum vested in Government securities did of
 right belong to him as heir apparent of William Elliot, or at
 least to the trustees, and ought to be applied in payment of the
 debts due by Mr Elliot, that his entailed estates might thereby
 be so far relieved. June 29. 1825.

Informations having been ordered to the Court, their Lord-
 ships were equally divided in opinion; but on Lord Robertson
 having attended, the Court found, by the narrowest majority,
 ‘ that neither Sir William Elliot, and the heir of entail of the
 ‘ estate of Wells, nor the trustees under the settlement executed
 ‘ by the late William Elliot of his Scotch estates, are entitled
 ‘ to relief from the Earl of Minto, as executor under the
 ‘ English will, of any debts or obligations which, by the law of
 ‘ Scotland, are burdens on the heritable estate of the said Wil-
 ‘ liam Elliot.’ The case was again taken up on petition and an-
 swers, when the Court being again equally divided in opinion, Lord
 Pitmilley was called in, and the Court, by the narrowest majority,
 altered the interlocutor complained of, and found, ‘ that the
 ‘ Earl of Minto is bound, out of the funds coming into his hands
 ‘ as executor under the English will, to free and relieve the pe-
 ‘ titioner, Sir William Francis Elliot, and the heir of entail of
 ‘ the estate of Wells, of all debts and obligations which burden
 ‘ or affect the said estate; and to this effect decerned in the decla-
 ‘ rator at the petitioner’s instance, assollized the petitioner from
 ‘ the whole conclusions of the action at the instance of the Earl
 ‘ of Minto, and decerned.’ It was afterwards explained, that this
 decree against the Earl could not, under the libel at the instance
 of Sir William Francis Elliot, extend beyond the funds vested
 in the three per cent Cons. Ann.; and the decree was restricted
 accordingly;* 4th February 1823.

* See 2. Shaw and Dunlop, No. 166. The opinions of the Judges will be found
 in the Faculty Report, from which it would seem that the correspondence did not enter

June 29, 1895. The Earl of Minto appealed.

Appellant.—By Mr Elliot's will the appellant is entitled to the whole effects in England of which the testator was possessed at the time of his death, and inter alia the L. 16,000 in the three per cents, with the single burden of paying the legacies bequeathed. There was no appropriation of this sum during Mr Elliot's life to the payment of Mr Balfour, or any particular creditor; and the rule of law therefore applies, that heritable debts burden the heritage. No doubt a testator may regulate the question of relief between heir and executor; but, in the present instance, there is in the deeds which he executed nothing which can be held to relieve the heir from the liability to which he is subjected by law. Indeed these deeds afford the very opposite inference; nor is there any thing in the situation of parties or the character the appellant holds under the will, to lead to a different conclusion. If, besides these considerations, you look to the conduct of Mr Elliot himself, the best of all authorities in a question like the present, you find that he did not contemplate that the bequest to the appellant should be subject to the claim made by the respondent. On the contrary, his whole conduct is only reconcileable with the opposite supposition. This is not to be shaken by a reference to vague probabilities or surmises what the testator intended to do. For the question is not, what might have been, or really was the view of Mr Elliot in selling Ormiston, and having L.16,000 remitted to London, but what he actually and legally did as altering or confining the rule at law. But here he converted part of his heritage into moveable funds, knowing that they were conveyed to the appellant; and he died without applying these funds to payment of an heritable debt, or imposing that burden on the appellant. The respondent always assumes, that, had Mr Elliot lived, Mr Balfour would have been paid by a transference of this very sum. That, however, is not a necessary inference; and, even if it were, quomodo constat that the instant after Mr Elliot would not have burdened to that very amount the entailed estate remaining in favour of the appellant.

Respondent.—1. It was clearly the intention of Mr Elliot, as evinced by his whole conduct with relation to the sum of money in question, that it should be applied in payment of his debts;

and not only of his debts, but of the particular debt due to Mr Baikour. This is placed beyond doubt by the correspondence; and this correspondence amounts to a legal appropriation in the debtor's lifetime. But farther, the appellant, as executor and universal legatee under the English will, is bound, in terms of the clause of relief in the deed of entail, to free and relieve the estate of Mr Elliot, and the succeeding heirs of entail, of all the debts to which Mr Elliot was liable at the time of his death. June 23. 1825.

2. The property in the three per cents was not legally situated in England at the time of Mr Elliot's death, and cannot be considered as carried by his English settlement. 3. If the clause of reservation of a power over the English property in the deed of December 1809, authorized Mr Elliot, a domiciled Scotchman, to make a will in the English form, such power must be construed strictly, and as referring to the property he then had in England; but if it is not so confined, the English will, made only under such a power, cannot be considered as affecting a large sum like the amount in question, transmitted to England with the view to a particular purpose, and in transitu only.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed.'

LORD GIFFORD.—My Lords, There is the case of Lord Minto v. Sir William Elliot; and I cannot conceal from your Lordships, that this is a case of very considerable difficulty,—that it appeared at the Bar that the Court below, being equally divided in opinion, called in the assistance of Lord Pitmilley,—and that then they held that Sir William Elliot was entitled to the claim he set up.

My Lords,—The circumstances of the case are these:—The late Right Honourable William Elliot was born and domiciled in Scotland, and was proprietor of considerable estates in the county of Roxburgh, consisting of the baronies of Hadden and Ormiston, and various other lands. Several years ago Mr Elliot executed an entail, by which he granted procuratory for resigning his whole lands and heritable estates in Scotland, for new investment to himself, and the heirs of his body; whom failing, to the heir whomsoever of the heir-male of his body who might be last invest; whom failing, to the heirs which were of his own body; whom failing, to Francis Augustus Lord Heathfield, and the heirs-male of his body; whom failing, to Sir William Elliot of Stobs, Bart. and other persons. The deed contained the usual clauses, and he expressly provided, that himself and his heirs-at-law should free and relieve the said lands and estate; and the heirs of tailie who should succeed thereto, of all debts to which he, the party executing the deed, should be liable at the time of his death;—then he reserved to

June 22, 1806. himself 'full power and liberty, at any time in my life, and even on deathbed, to alter the said course and order of succession as to all the heirs of tailie before specified, and to revoke or alter all or any of the conditions, provisions,' &c. Then, my Lords, of the same date, he by trust-deed disposed to Lord Minto, Sir George Shee, Bart. and Gilbert Ker, Esq. the whole estates then belonging to him, and particularly described; 'as also, all and sundry other lands and heritages, and all debts and sums of money, heritable and moveable, &c. with power to set tacks, &c.; as also, with power to my said trustees, or their quorum, to borrow money, and grant securities therefor upon the lands, baronies, and others thereby disposed; and likewise, in case my unentailed property should not be sufficient for payment, and they should deem a sale of part of the unentailed lands expedient for that purpose, with power to sell and dispose of the lands and baronies of Ormiston and Hadden particularly before described, or so much thereof as they may think necessary for payment of my debts, and answering the other purposes of this trust, by public roup.' The purposes of the trust were declared to be, first, For payment of deathbed and funeral expenses, the expense of executing the trust, and recording the deed of entail; secondly, For payment of an annuity of L. 400 a-year to the heir of entail in possession for the time, till the expiring of the trust; thirdly, For the payment of all just and lawful debts; fourthly, For the purchase of the teinds of the barony of Hadden, in case the same should not be sold.

My Lords,—After executing this deed of entail in the year 1806, in the year 1809 he executed a supplementary deed of alteration; and by that deed of alteration he provided, that instead of the annuity of L. 400 to the heir of entail, it should be reduced to L. 100 a-year, and he gave the trustees power to pay that sum instead of the L. 400. 'Secondly,' (his Lordship then read the clause). Then he appoints his trustees to restrict the annuity of the heir to L. 100; and near the end of the deed there is the following clause,—'And whereas I am possessed of certain funds,' (his Lordship then quoted the clause). Then he concludes by a ratification of the trust-deed. In pursuance of this disposition, he, on the 4th of July 1816, executed a will, and in that he devises a residuary bequest to Lord Minto: 'All my books, and whatsoever other effects and property I may die possessed of in England, I give and bequeath unto the aforesaid Gilbert Earl of Minto, on condition that he pays Ambrose Glover, Esq. of Ryegate, in the county of Surrey, gentleman, attorney-at-law, the sum of L. 100; and unto Mrs. Ridgeway, the wife of Mr. William Ridgeway, tailor at Ryegate, servant to my late mother, the sum of L. 100; and unto my servant, Thomas Young, if he should be in my service at the time of my death, the sum of L. 50; and I do hereby appoint the said Gilbert Earl of Minto, and Ambrose Glover, executors of this my last will and testament; and I also hereby confirm the entail and trust-deed by me already made of

' my Scotch estate, and of my property in that part of Great Britain June 22. 1892.
' called Scotland.'

My Lords,—Your Lordships perceive that the effect of this trust-disposition was to entail all the estate of Hadden, and to set apart his other property for the payment of the debts which might be owing at the time of his death, reserving to himself the right of disposing of his English property by will, unaffected by this deed. I should state to your Lordships, that one of the three debts he owed was an heritable bond for L.16,000 sterling, which had been given over the lands of Ormiston and Hadden in favour of the late Arthur Balfour, Esq.—the right to which bond was, in the year 1818, vested in John Crawford Balfour, Esq. of Portland-place; another sum of L.5000 being due to Sir Robert Preston. I should also state to your Lordships, that the sum for which the heritable bond was given was, by the form of the bond, payable in London. Mr Elliot resolved to sell the lands of Ormiston; and your Lordships will see, by the correspondence that follows, that one object of his disposal of the estate of Ormiston was to get rid of this debt, which was a charge upon the entailed estate. A negotiation took place with a gentleman of the name of Mein, who offered L.27,000 for the estate; but in the month of June 1818 he writes to Mr Ker, ' Upon due consideration of all the circumstances of the case, and of Messrs Brodie and Imbach's opinion, I will take L.28,000 for Ormiston, provided Mr Mein defrays half the expense of the conveyance, and consents to pay the whole, or L.16,000 of the purchase-money, in London.'

My Lords,—The matter was ultimately concluded that L.16,000 should be paid in London; and I would just read to your Lordships the correspondence, for these letters are very important in the consideration of this case. (His Lordship then read the whole correspondence already quoted in the report). Your Lordships perceive by these letters his object was to have the L.16,000 in London to pay Mr Balfour; and in the mean time he thought it right to make such interest as he could of the money, until the time arrived that he could pay Mr Balfour, he being to have six months' notice before he could be called upon to receive the money. Upon the 6th of July Mr Mein's agent wrote to Mr Brodie, that his employer would that day give orders to place the L.16,000 in the hands of Messrs Drummonds in London. Of the same date Mr Brodie accepted the offer in name of Mr Elliot, and (also of the same date) wrote to that gentleman as follows:—(his Lordship then read the letter). My Lords, on the 12th of July Mr Ker instructed Mr Brodie to give notice of payment of the debt of L.5000, and on the 14th Mr Mein wrote that he had ordered the money to be paid in to Messrs Drummonds. On the 11th of July the agent of the British Linen Company at Jedburgh had written to his principal in Edinburgh, stating, ' At request of William Mein, Esq. who holds a deposit-account here, I have to solicit you would have the goodness to direct Messrs Smith and Company to

June 22, 1825, 'pay over the L.16,000.' Then it was paid on the 10th of July 1818 into Drummonds, on account of Mr Mein, and then it was transferred from Mr Mein's credit to the credit of Mr Elliot. Then, on the 6th of July 1818, Mr Elliot wrote to Mr Balfour as follows:—(his Lordship then read the letter). There was a deed prepared to discharge the mortgage; but on the 26th of October 1818 Mr Elliot died, before the six months had elapsed, at which time the money was to be paid off. After his death it appears the purchaser of Ormiston became anxious to have the estate disburdened of the claims which existed at the instance of Mr Balfour, and that gentleman having refused to renounce his security over Ormiston, and restrict it to the other lands included in the bond, Mr Mein, or the Earl of Minto, found a gentleman, a Mr Ainslie, who was willing to advance the money upon the restricted security of the barony of Hadden, and the security was transferred to Mr Ainslie. On the 2d of June 1819 he executed a deed, whereby he restricted his security accordingly, and discharged Mr Mein, and the estate of Ormiston, of all claims for the payment thereof.

Now, my Lords, under these circumstances, the question is, Which part of the estate is liable to pay this L.16,000? By the will which I have stated, there is a bequest to Lord Minto, of 'all my books, and 'whatsoever other effects and property I may be possessed of in England;' therefore he says, that the L.16,000 passed by the will. And, on the other hand, Sir William Elliot says, under all the circumstances of the case it was clear, that Mr Elliot intended to apply that L.16,000 to the debt due upon the estate to Mr Balfour, and that the correspondence I have stated shews the intention of Mr Elliot, that this L.16,000 should be appropriated to the payment of Mr Balfour.

That under the English will the L.16,000 nominally passed, there seems to be no doubt; for although the word 'effects' is coupled with the word 'books,' and does not seem to have been used with reference to any such large property as this, I apprehend, strictly speaking, the property clearly passed under the will. The only question is, Whether, under all the circumstances of the case, there was such a separation of the L.16,000 by this correspondence, (I will not say actual appropriation; but not only an intention to appropriate, but such a separation), as shewed the purchaser that this L.16,000 was to be applied to Mr Balfour? and supposing Mr Elliot had lived, and had misappropriated that sum after it had been paid by Mr Mein, under the impression that Ormiston was to be free from that debt, whether he would not have had an equity against Mr Elliot to have that sum repaid?

My Lords,—As I have stated before, the Court below were very much divided upon the question; and I am free to confess to your Lordships, that the case appears to me to be one of very considerable difficulty. Lord Minto is contending for more than I think the intention shews he was entitled to; because no man who looks at this correspondence can doubt, that it was the intention of Mr Elliot, upon

June 29. 1825.

receiving the L.16,000, to pay off that debt payable in England, and relieve the estate from that debt which he was so anxious to relieve it from: But perhaps a mere intention on the part of Mr Elliot, unless it was sufficiently expressed in the correspondence, so as to shew a sort of right in Mr Mein to call upon Mr Elliot to discharge that debt, would not be sufficient. But whatever we may think out of this House, we have no right to speculate as to what the mere intention was—he might have altered his intention before the money was paid. You have no right to say what his intention was at the time of his death, unless you can see that the L.16,000 was detached from the general property, so as to be appropriated by him for the payment of this debt to Mr Balfour. I have thought a great deal of this case, and it is one of considerable difficulty; yet I think the decision of the Court of Session is right. I think, taking all the correspondence and all the circumstances of the case into consideration, there was an equity attaching on the L.16,000 with respect to this debt to Mr Balfour, which called upon Lord Minto to apply a sufficient portion of the estate to the payment of that debt.

Such, my Lords, after a very anxious consideration of this perplexing case, is the result of my opinion; and therefore, upon the whole, I should humbly propose to your Lordships to affirm the decision of the Court below, which appears to be not only consistent with the party's intention, but consistent with the rules of law, (as applied to this case), which entitles Sir William Elliot to call upon Lord Minto to apply that part of the fund existing in England, which appears to be carried by the will, but with this equity attaching upon it, in consequence of all the correspondence that had taken place between him and Mr Mein, in payment of that debt. What took place after Mr Elliot's death, cannot be taken into consideration. The debt is still existing; and the L.16,000 not having been paid at the time of his death, what took place afterwards cannot affect the rights of the parties. Under all the circumstances, I think the decision of the Court of Session is right.

Appellant's Authorities.—*Cheisly*, Dec. 21. 1704, (5531.); *Ker*, July 7. 1714, (5583).

Respondent's Authorities.—*Campbells*, Jan. 4. 1747, (5281.); *Farquharsons*, Feb. 10. 1756, (6569.); *Countess of Cromarty*, Jan. 26. 1764, (6601.); *Waddel*, 1814, (House of Lords, March 9. 1819), 1. *Vesey*, 273.

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

No. 59.

WILLIAM HARLEY, and Others, Appellants.

ARCHIBALD CAMPBELL, Esq. of Blythswood, Respondent.

Superior and Vassal—Clause.—The Court of Session having found, that a clause in a feu-contract, allowing subdivisions of the feu to be held of the superior, but declaring that all dispositions, conveyances, and infeftments, of the whole or any part of the lands, shall be made out by the superior's agent, otherwise the same shall be null and void, was available to the superior to entitle him to reduce any deed or conveyance not prepared by his agent, in terms of the original feu-contract, —the House of Lords remitted the case for review, and the opinion of all the Judges.

June 29. 1825.

1ST DIVISION.
Lord Meadowbank.

THE lands of Blythswood are held under a strict entail prohibiting alienation. From their immediate proximity to Glasgow, there was a prospect of feuing to advantage; and to accomplish that object, an Act of Parliament was obtained, vesting part of the estate in trustees. Harley, merchant in Glasgow, in 1804, feued a large area of the property from the trustees, with the object of subdividing and selling the ground in lots for building. By the feu-contract it was *inter alia* provided, 'that it shall not be lawful to, nor in the power of the said William Harley, or his foresaids, at any time hereafter, to sub-feu the foresaid lands or any part thereof, or absolutely to dispose the same, so as to be held of themselves, but whatever of the said lands shall be so feued or disposed, shall be held immediately of and under the said trustees, and their assigns or successors.' Then it was conditioned, that if the feuar dispose only part of the lands, the annual duty of such part or portions should bear such proportion to the total feu-duty, as the space so sold or disposed did to the whole space originally feued; but when, in consequence of the subdivision, the feu-duty of any particular portion came to be less than L. 10 sterling, there was a certain graduated scale of additional per-centage stipulated in favour of the superior, reaching as high as 25 per cent when the feu-duty for any portion fell below L. 2 sterling; and on these terms the trustees become obliged to receive and enter the disponees of Harley as vassals, and to admit of the subdivision of the feu-duties accordingly. It was next provided, 'that all the dispositions or other conveyances of the whole, or of part and portions of the said lands, shall be recorded in the books of a competent Judge, within one month of the date thereof, which shall contain warrant to the said trustees or their foresaids to raise letters of horning, and all other necessary execution, against the said disponees or their foresaids, for recovery of the feu-duty or feu-duties which may

June 29. 1825.

‘ becomes due and resting for the said lands from and after their entry thereto;’ declaring, that ‘ the said dispositions or other conveyances of the whole, or of parts and portions of the said lands, with the infeftments to follow thereon, shall be made out and extended by the agent of the said trustees, or their foressaids, for the time being, and that at the proper charges of the disponees of the said lands, or of the disponees or their foressaids, otherwise the same shall be void and null. Declaring also, that all sales, dispositions, or other conveyances, of the whole or of parts and portions of the said lands, upon terms in violation of, or inconsistent with these provisions, shall be ipso facto void and null, with all that has followed or may follow thereon, to the disponees thereof.’

Harley having become bankrupt, he executed a general trust-deed of his whole property, in favour of trustees for behoof of his creditors. Dun, Wright, and M‘Gregor, purchased from Harley’s trustees a piece of the ground, originally feued by him from Blythwood, for an annual feu-duty of L.31. 3s. 8d. and a purchase price of L.900; and they accordingly received a disposition from Harley, with consent of his trustees, on which infeftment followed. The disposition and infeftment were in exact concordance with the original feu-contract, except that neither were made out by the agent of the superior. The vassals presented their feu-disposition for confirmation, which was refused in respect of the condition in the original charter. Upon this refusal the vassals intimated, that ‘ they would hold the superior liable in all loss, damage, and expenses, which the disponees in said disposition may sustain or be subjected to by the want of such charter of confirmation.’ In order to ascertain the precise nature and extent of his rights, Blythwood raised an action of reduction, calling for production of the disposition in favour of the vassals, with subsequent infeftment, alleging, as the ground of reduction, that the disposition and sasine ‘ had been made out and extended by agents different from the agent of the superior, and have been granted in complete violation of the clause above quoted;’ and concluding, that the disposition and sasine ‘ ought and should be reduced, re-treated, rescinded, cassed, annulled, decerned, and declared, to have been from the beginning, to be now, and in all time coming, void and null, and of no avail, force, strength, or effect in judgment, or outwith the same, and the pursuer reponed and restored thereagainst in integrum; and the said writs being so reduced and set aside, it ought and should be found and declared, by decree foressaid, that the said William Harley, and his

June 29. 1825. 'trustees, are liable to the pursuers for the whole feu-duties due, and to become payable out of the foresaid subjects disposed by them as aforesaid, and in performance of the prestations of the feu, and that in terms of the feu-contract above mentioned.'

The Lord Ordinary reduced, declared, and decerned in terms of the libel; and on advising petition and answers,

Lord Hermand observed,*—It appears to me that the respondent was under the necessity of bringing this action. Indeed I think, if he has not some check on these conveyances, he will be most materially injured. He is required to grant either a charter of confirmation or to pay damages. Did not this necessitate him to bring this action? Therefore he has that strong interest which every man has to avoid a claim of damages. But farther than this, he has already about ninety feuars, and he may have as many more,—the feu-duties are thus all subdivided, and of course he has a direct interest to see that they are so subdivided as to secure himself. This is a clause very favourable to vassals, allowing them to divide their feus; but who is to attend to the subdivision of the feu-duties but the superior or his agent? It is not uncommon to prohibit subfeudations altogether, but here they are allowed; but all infeftments must be presented for confirmation within twelve months from their date, and must be recorded within one month; but there is an exception, even in that case, of marriage-contracts and private deeds, which are good without confirmation at all. This is another indulgence to the vassal. This appears to me to be a very simple case. The respondent would have no security for his feus, unless the agent was to prepare the deeds who would draw the charter of confirmation. It is not known by every person, that this is always done by the agent of the superior. But by the law of the land the respondent could not be compelled to confirm any disposition at all, much less a disposition expressly contrary to the conditions of the feu. The respondent, however, does not object to give a charter of confirmation, but it must be on the conditions of the original feu-contract. This appears to me to be for the benefit of the vassal. The superior's agent cannot put in what clauses he chooses. It proceeds upon a mutual conference, and will be in terms of the original rights. Adhere.

Lord Balgray.—It strikes me very much in the same light. When I look into the summons, I consider it to be really a process of declarator, for the purpose of declaring the right of the superior to enforce the conditions of his feu-charter. It con-

* These are the opinions which were laid before the House of Lords.

June 29. 1825.

tains no conclusion against the original feuars, and therefore, if these deeds are reduced, the right would revert back to Mr Harley. I look upon this case upon general principles of law. I always understood, that a person might put any lawful stipulation he chose into a feu-contract; and whatever was contained in the dispositive clause of the feu-contract, either reserving the right of the superior, or containing restrictions, conditions, or prohibitions, in so far as these are legal, and not contra bonos mores, the whole of them are effectual on the principles of contract. The principles of feudal law have really nothing to do with this case. The superior must take care that these restrictions or reservations are put into such place in the feu-right as that they may be published to the whole world. When I look at the feu-charter here, I see that the express condition is, that the vassal shall be bound to engross all the conditions, restrictions, and limitations in the body of his infeftment. They are therefore sufficiently published to the whole world, and third parties who contract upon these conditions have nothing to complain of. The question of real burdens has nothing to do with this question. This is a question entirely between superior and vassal; and if it is admitted that the superior is entitled to make such stipulations and conditions as he chooses, if the right is accepted of under these conditions, then the feudal right goes down burdened with these conditions, and must be effectual against all the world, and against any party who chooses to take the right so burdened. He sees this obligation, and is bound to fulfil it, and therefore this question comes to be decided on general principles of law. A superior may put into the dispositive clause whatever conditions, limitations, or restrictions he chooses, and, if these are not contra bonos mores, they are effectual against the whole world. Now to come to this clause, we have only to consider whether it is contra bonos mores. I certainly agree with what has been thrown out, that this is a very dangerous clause for the superior; for if there is any error in the charter, or a delay in granting it, he may be subjected in damages. But there is a quid pro quo here. When the parties come to demand a confirmation, which in common law he cannot be compelled to give, he says, I waive any common law right; I agree to give you a charter of confirmation; but it is upon the condition that the disposition and relative deeds shall be prepared by me,—for I consider the superior and his agent as the same here; and he is entitled to say, that I will not confirm your right unless upon this condition, that I may be satisfied

June 29. 1825. that all the conditions and limitations of the original feu are engrossed in the subsequent deeds; and therefore, as I see nothing in this condition that is illegal, I think the party has a right to enforce it. Whether it is a prudent or a wise thing for him to do so, is a question which we cannot enter upon.

Lord Succoth.—I am now of the same opinion. On reading the petition, I was impressed with the belief that Mr Campbell had really no interest to bring the action in which he now insists,—that his interest was such that I doubted if it was sufficient to entitle him to insist in the action. But on reading the answers I came to be of a very different opinion. It appears to me that this condition is not one of mere caprice or whim on the part of Mr Campbell. If it were so, perhaps it would not be right in us to give effect to it. But I think there is a strong interest qualified in the different statements given in these answers. Some of them have been already adverted to; but what strikes me most is this, that Mr Campbell is entitled to an advance of feu on these sub-feus. He might be disappointed of these additional feu-duties if the deeds were not prepared by his agents, in consequence of which he might not know of these subfeu-duties; and I can easily imagine that he might thus lose his additional sub-feu-duties; therefore I think there is a strong interest to insist on this clause being complied with. There are a variety of stipulations mentioned in the original feu-contract, which it is necessary for Mr Campbell to see are properly engrossed in the subsequent sub-feus; and being thus satisfied of the interest which Mr Campbell has to insist in this action, I think the greatest difficulty of this case is got over. It is a condition upon which the feu is granted; and that being a condition of the feu, I do not see that any person is entitled to insist on its being dispensed with. I agree in the opinion which has been delivered, that a superior is not bound to confirm at common law; and therefore, when the respondent agrees to a clause by which he passes from that, he is entitled to annex any condition which he pleases as a condition for this concession on his part. Therefore I think the interlocutor well-founded in general. Whether it is sufficiently worded so as to make the reduction only effectual quoad the superior, I am not so sure. Probably it should be made more specific.

Lord Gillies.—The opinion which I have formed in this case differs from those which have been delivered; and I confess the opinion which I have formed has been arrived at with considerable doubt. I confess I am no friend to this clause. I do not think it is calculated to do good to any human being. I think

June 29, 1825.

it likely to be attended with very inconvenient and evil consequences to all the vassals; and with regard to Mr Campbell himself, I consider it attended with most dangerous consequences, by which he makes himself responsible for the accuracy of his agents; and I should be sorry to see any gentleman put into such a situation. I think this consideration goes so far into the case, that I can see no real interest which he has to enforce this clause. The only ground is, that in this way he may be better able to enforce the other clauses in the feu-contract; but for this he has all the aids which the law can give him; and I know no set of persons who have so many engines of the law to make their rights effectual as superiors; and therefore I can see no sufficient interest which the superior has to enforce such a stipulation, which is attended with such very inconvenient consequences to the vassal. In addition to this, it certainly appears to me that it is *contra utilitatem publicam*, and may be attended with the greatest inconvenience, and in some cases with the most dangerous consequences. Put the case that two conveyances are granted, the one written by Mr Campbell's agent, and the other not, although bearing to be so; am I not in bona fide to contract with the person whose right appears to have been prepared by the superior's agent? I go to the superior to be confirmed; he refuses it on the force of this clause in the original feu-contract; while he is obliged *ex concessis* to confirm the other conveyance, which has been prepared by his agent, although posterior to mine. Is not this then a condition which may be attended with the most pernicious consequences to bona fide purchasers, and most serious consequences to the pursuer himself?

I must own I have heard some things stated to-day that I am not prepared to go along with. It is said, that a purchaser has no right to demand confirmation from the superior. I did not know this. I considered that he was bound to confirm. I may be mistaken; but I still think, that at common law Mr Campbell is bound to confirm. But it is said that this is not a real right, but only a personal right. If so, there are only two ways it could be made effectual, either by a charge *ad factum præstandum*, or by a claim of damages. But neither of these would be effectual. I cannot understand how any thing but a real right can entitle a superior to challenge and irritate a contract entered into with third parties; yet it is said not to be a real right. But this is an irritancy declared of one right, although the other is not resolved. In the case of an entail, you must irritate the

June 29. 1825. grantor's right also. But here it is said that this deed is only to be reduced quoad the superior, and that the right will remain good quoad third parties, against whom it may be effectual. I think this is a point of some importance in this case; and to me it appears in a different light from what has been hinted from the Bar; for if it is not a good right against the superior, it may ultimately not be a good right against third parties. For, take the case which I formerly mentioned of double conveyances, where the right which is last granted is confirmed, while the prior right remains unconfirmed on account of the conveyances not having been prepared by the superior's agent, although they may bear ex facie to be so,—in this case, has not this clause the effect of setting aside this prior right entered into bona fide, and giving effect to a posterior right in preference? and therefore this clause is effectual not only against the superior, but against all the world, the posterior conveyance being confirmed. This completely and effectually irritates the prior conveyance, not merely against the superior, but against all the world. Therefore, whether the superior is bound at common law to confirm or not in this case, he was bound to do so by his charter; but if effect is given to this clause, that obligation may be reckoned quite nugatory. Alter.

Lord President.—I consider this a case of some difficulty, and some nicety. It is the first case which has come before us where I have seen a condition of this kind. The first question is as to the interest of the respondent to enforce this condition. I think his interest consists in this, that it is the machinery which he has himself invented for enforcing the other clauses in the feu-charter. I am afraid it is a very dangerous machinery for Mr Campbell himself. It is like a cannon overcharged, which may explode to his own utter ruin and destruction; and one day or other I fear he will find that it will do so. But that is his affair. There are certain beneficial conditions in this contract which he has an interest to see enforced; and he has invented this clause to enforce these conditions; and the vassal has consented to this machinery. Whether it is beneficial or not, it is not for me to enter upon. That is their affair, not ours. They must have looked to that, and must abide by it. I do not think we are to look to this as a matter of public convenience or inconvenience. It is a matter of private contract, and, as a matter of private contract, I think the interest of the respondent to insist in this action is quite clear. It is the machinery which he has invented in order to carry into effect certain other

June 29. 1826.

stipulations which he has introduced into his feu-contract. For example, suppose I feu part of an estate, and reserve a road for the benefit of another part of the estate which goes through other feus or lands; and I stipulate that all the locks and keys on the gates of that reserved road shall be made by my own blacksmith; there is surely nothing wrong in that. The reason of it may be, that if I trust the locks to be made by another smith, he may forget to give me a key; and when I come with my carriage, I may not be able to get through this reserved road. This is just the machine which I have invented to enforce the use of the road; and in the same way in this case: this is the machine invented by the respondent to enforce the other stipulations of the feu. It is sufficient to render this condition effectual between superior and vassal, if it is so defined and published as to be made known to third parties. This is a feu-right inserted in all the deeds upon record; and therefore it is effectual against all the world. There is nothing illegal in this condition. It may be ruinous on the one hand, and it may have been foolish on the other, to agree to it. But they agreed to this condition. Why did the feuars agree to it? It is said that this is against the Jurisdiction Act; but the Jurisdiction Act does not speak of confirmations. It speaks of resignations, but not of confirmations. This is a voluntary act, for which he was not bound at common law. Again, it is said the clause may be void, because the superior's agent may not be found at the time, or able to prepare the deeds. This is a dangerous consequence to the superior; but it is a condition which he himself has entered into. Lord Gillies has pointed out this in the strongest terms. There is here a reservation in the case of private contracts, where the party is allowed to prepare the deeds by his own agent, and confirmation and publication are dispensed with. Therefore, as I see nothing contrary to law, and as the public are sufficiently protected by the publication of the conditions upon the record, which must enter into all future conveyances, I rather think the interlocutor is right.

The Court adhered. On advising reclaiming petition and answers, Lords Hermand, Balgray, and Succoth, expressed their opinions very shortly in terms of the opinions formerly delivered.

Lord Gillies.—I am extremely sorry that I differ in my opinion from so many of your Lordships. I do so with great reluctance; but after paying every attention in my power to this case, I feel myself bound to say, that I consider the interlocutor wrong, and as carrying with it most fatal consequences to the law

June 29. 1825. of this country. I have formerly stated my opinion at considerable length, and I shall now state the grounds of my opinion as shortly as possible to your Lordships.

This is an action by Mr Campbell against the disponees to a certain feu granted by him, not against the party who entered into any contract with that gentleman, for this is not alleged; it is not pretended that there was any direct contract between Blythswood and the present petitioner; but the action is brought against a purchaser—and the object of the action is to set aside the disposition granted to a third party, with whom the pursuer never directly contracted. The action is brought upon the ground that the deed is liable to reduction, not because it is at variance with the terms of the original feu-right; for this is not pretended, there is not the least insinuation of that kind—but the only ground on which the pursuer objects to this deed is, that it is not prepared by his own agent. In defence against this action it is pleaded, 1st, That the pursuer has no title or interest to pursue this action; 2d, That it is not the proper action for obtaining the remedy which he wants; and, 3d, That the burden here is not a real burden upon the lands; and therefore cannot be made effectual against the possessor.

I should have been disposed to have stated these defences in the reverse order—to have considered the last defence first, from its general importance, and as conclusive of the present case. But in order to be more distinct in the few observations I mean to offer, I shall follow the order of these defences as stated by the party. First, What is the interest alleged by the pursuer? for I take it to be granted that he must shew an interest. It will not do to say merely, that he wishes to get out of the Court of Session; for here I cannot agree with my brother, Lord Hermand. It appears somewhat strange to say, that his interest is to keep out of this Court, and to attain that object he brings his action in this Court. This will not do; it is impossible for a person to pretend that he has an interest to keep out of this Court, by bringing an action here for that purpose. But it is said, that this clause was necessary or expedient for enforcing the other clauses in the deed. In the clause per se, there is no apparent interest in Mr Campbell at all. It is true, his agent may have an interest, but Mr Campbell himself has none. He says, however, it is necessary for enforcing the other clauses. That plea, however, can never apply here; for, in the present case, it is not alleged that there has been any deviation whatever from the terms of the feu-rights; therefore

there can be no necessity in this case for enforcing the other clauses, all of which are contained in the disposition under reduction. But it is said, that he is threatened with an action to compel him to grant a charter of confirmation; and in order to avoid that action, he has brought this action. June 29. 1824.

Now, as to the first interest stated for the pursuer, you will observe, that every one of the stipulations are inserted in this deed, and every one of them are enforced by irritancies, each applicable to the different stipulations. Why is it necessary to guard, by a separate clause, a clause already sufficiently protected by irritancies? But it is said, that the sales might be concealed but for this clause; but is this clause calculated to prevent that concealment, or can it do so? Can a sale be concealed, which is completed by disposition and infeftment which enters the record? This stipulation affords no protection whatever; because there is nothing to prevent a party from concluding a bargain by minutes of sale, and entering into possession. But it is said, a great number of inquiries must be made among the agents; but why not? Will that circumstance give any interest to reduce a title? But this point is so very ably argued in the petition, that I need not dwell upon it.

But the second reason is, that he brings this action to avoid another action with which he is threatened, to compel him to grant a charter of confirmation. You will find it admitted in the answers, p. 17, that the obligation to confirm at common law would not entitle him to bring this action. 'It may be true, that if the feu-rights had been silent in that particular, the respondent would have no title to reduce. He must have been contented with refusing the confirmation, if he thought proper. But the present action is brought precisely because the feu-rights are not silent.' Therefore it is admitted, that at common law the obligation to confirm would not entitle him to bring this action. On this point, it is proper that your Lordships should turn to the disposition, (see Appendix to first Petition). There is nothing here which appears to me as binding him to confirm. But it is sufficient for my present view of the case, that the matter is doubtful,—that it is questionable whether he is bound to confirm or not. Here you are called upon to reduce this title, because there is such a condition, before it is ascertained whether there is such a condition or not. Supposing, in a proper action for that purpose, your Lordships should find that he is not bound to confirm, are you not in this case anticipating the judgment you might pronounce in that case? It is true there

June 29, 1825. is another clause in the deed, but that appears to me just as doubtful as this one is.

But I apprehend there is a different objection, which may be stated to the title to insist, which it would be right for both parties to consider. Your Lordships will attend to the Act of Parliament authorizing those feus, 'As to such parts or part of the lands aforesaid as shall be feued, it shall not be lawful to, nor in the power of the said trustees, nor any of them, to accept or take any fine, premium, grassum, or consideration whatever, for granting the same; but such feus shall be granted at, and for payment of, the highest feu-duty or feu-duties that can be got or procured for the same.' These are to be granted for the highest feu-duties. Now, will any person tell me, that under this strange stipulation any person will give the same price that he would have done otherwise? This clause necessarily exposes the vassal to an additional expense. This is indeed admitted in the answers. Is it no additional expense for a man to pay a set of agents? This is a circumstance which must be in the view of parties. The pursuer seems to consider this as a matter of very little importance; but he admits the fact that this does diminish the feu-duty. Turn to the 22d page of the Answers:—'If it shall be held that these emoluments are derived from the vassals, and that the expense of employing the respondent's agent in drawing the deeds is, to a certain extent, an addition to what would have been necessary if they had employed their own agents, where is the hardship? In that case it just resolves into a species of tax upon each transference, which, from the terms of the original feu-contract, they must have seen they were bound to pay. But if, in another view, and which the respondent rather takes to be the true one, this circumstance, like every other burden, was taken into consideration by each vassal in fixing the feu-duty which he was bound to pay, then the lucrative office is in truth one of which the emoluments are defrayed by the superior himself, in the shape of a diminution from that feu-duty which he would otherwise have drawn.' Here it is expressly admitted, that the feu-duty has been diminished. Another consideration, therefore, than the feu-duty, has been taken into account here; and I think it is the interest of both parties to look how this agrees with the terms of the Act of Parliament. I shall not say more, but I think it must be the opinion of every impartial person, that Mr Campbell exposes himself to a very great risk by inserting such a stipulation in his feu-rights, and therefore he

cannot be a gainer by it. Your Lordships will recollect, just the other day, the case of Brown, respecting some feus in George's-square.* It was an action to enforce a stipulation in a feu-charter; but your Lordships refused action to the superior, because he had really no interest to enforce the stipulation. Certainly the plea here cannot rest on any interest which Mr Campbell himself has, but for the interest which he has in his agent, who is to reap all the benefit. It is making him like a town-clerk,—and I believe the office of town-clerk of Edinburgh has cost from L. 3000 to L. 4000,—but that will not do. I apprehend he must shew that he himself has interest, in order to entitle him to insist in this action.

The second defence is, that this is not the proper action. I conceive that it ought not to have been a reduction, but a declaratory action. By the law of this country, (and I believe it is peculiar to this country), any person who apprehends that a claim is to be made against him, may bring forward his action to have that put an end to, before the claim is actually made; and therefore, where a claim is apprehended, the proper remedy is a declaratory action. A reduction may no doubt be competent, where both the pursuer and defender are parties to the deed sought to be reduced. Thus, a tenant may reduce a tack, where the landlord is going to make a claim against him which he thinks the tack does not warrant; but if a claim is made against the tenant, will the tenant be entitled to bring a reduction, not of the tack, but of the landlord's title to the estate? This is the case here, for Blythwood is not a party to this deed; but he says, he must either confirm or bring this action. But when he states that he must reduce, he says, there are other cases where the rights have not been prepared in terms of the original feu stipulations. Why then does he select this party, who is innocent of any deviation from the feu-contract? I shall not detain your Lordships longer on these two points, but proceed to what I consider the most important in a general point of view, viz. whether this is a real burden or not. I apprehend clearly it is not; and in pages 40. and 41. of the petition, you have this doctrine extremely well explained and supported by the authorities of our first writers on the law of Scotland, (his Lordship read them).

You will look to those clauses which are on page 7. of the petition, (his Lordship read them). If you leave out the irritant clause, there is not one word here enforcing the obligation. Is this clause expressed, as Erskine says, in the words proper

* See 2. Shaw and Dunlop, No. 277.

June 29, 1825. to constitute a real burden? If the burden is not real, can it be enforced by an irritancy against third parties? The respondent seems to concede that this is not a real burden; but he has found out a middle kind of burden, neither real nor personal, but partaking of the qualities of both; and you are gravely told, that every condition which is lawful in itself may be made real, and may be enforced by annexing an irritancy to it. This is said upon the authority of Mr Bell; but if my memory does not deceive me, that learned gentleman says, that a burden cannot be made real unless it is real in its own nature. If this stipulation is good, I do not know of any stipulation that can be bad, for it is purely a personal obligation. A superior may tie down his vassal to employ his shoemaker, his tailor, and his surgeon. It is clear that the superior may have an interest in doing so, for the encouragement of those persons who are his vassals and residing on his property; but if the superior is to name my agent, he may, with equal propriety, and certainly with much greater safety, name my shoemaker also. If he can name my agent, he can also stipulate the rate at which that agent must be paid. He may make it five, or he may make it fifty per cent. But it is quite impossible to hold such a burden as real. I conceive it cannot be real, for many reasons:—1. It is a feudal burden; 2. It is not in words made a burden on the lands; 3. The record does not shew the name of the individual who is to be employed; and, 4. This may be executed abroad. If it is not a real burden, it cannot be enforced by an irritant clause. The great division of rights, in our law, is into real and personal. If you will look into Erskine, in the chapter upon contracts and obligations in general, you will see what he states on this subject. At the very commencement of the title he says, the great division is real and personal rights, and, to point out the difference between these, the personal rights can be enforced against the debtor and his representatives only, but real rights can be enforced against the possessor; (his Lordship then read the passage from Erskine). Now, how does the matter stand? A real right gives action against the possessor, but I deny that the pursuer can have any right of action against the petitioner, to enforce an obligation which is not real. The pursuer never contracted with the petitioner. He is merely a disponent of the lands, and it is only as such that he has any connexion with him. Therefore, unless this stipulation affects the lands, it cannot affect the petitioner. The pursuer may enforce the clause against his proper debtor, the party with whom he contracted.

Nothing can evince more clearly the strangeness of this action, than the admission that a claim for total reduction is not here. It is admitted that this disposition is good against all except the superior, when it is admitted that the object of this action is merely to reduce this deed quoad the superior. I apprehend, that the plea of the pursuer is hostile to every principle. It is quite an anomaly in our law, that a deed should be reduced as to one party, and should be good against all the world beside. (Here Lord President hinted as to a reduction on the bankrupt statutes).

The reductions under the bankrupt statutes are total reductions. The deeds are completely set aside—no doubt the debt may still subsist, but the deeds themselves are null for ever. Take the case of an indorsation of a bill. You may reduce that indorsation, and the rest of the bill may be good. But every indorsation is a bill itself. All the actions on the Act 1696 and 1621 are to reduce and set aside the deed in toto. The pursuer gives various examples of this in the answers, p. 14. The most favourable example is that of a freeholder to reduce a decree of the commissioners. But who can doubt this? No doubt it may still continue to be the rule of payment although reduced, because there is no other rule of payment. Just like a lease; a lease may be reduced and set aside, but if the tenant continue in possession without any stipulation or bargain, that reduced lease will still continue to be the rule of payment, just because there is no other rule. But you will attend to this. This deed is a disposition and infeftment,—a real recorded right. When a disposition and infeftment are reduced by the proper party, the record is kept correct by the insertion of a new investiture. But here the record is still to remain. As it is only to be reduced quoad the superior, this infeftment must continue in the record. The petitioner is, and will continue to be, the feudal proprietor of the feu. Mr Campbell cannot touch it. So here you have a decree of the Court, declaring an infeftment null and void, and yet this infeftment stands on the record a proper investiture. What is to be the state of the records of this country if this is to be the case, that you have a recorded infeftment which you cannot touch, and a recorded judgment reducing that infeftment? No doubt it is said, that a new disposition may be granted, and if that is written by Blythwood's agent, he is bound to confirm it. But how could he confirm such a conveyance, knowing, as he does, that the feu is another person's? All this shews how extremely difficult and dangerous it is to deviate in the least degree

June 23. 1626

June 29. 1825. from those great principles of our feudal law, and from that security in our records, which has been long and justly considered as the safeguard of our landed interest. If these are to be infringed upon, I know not to what extent it may go; and perhaps it would be better that we had not any such records, as to subject them to the hazard to which such a decision would expose them.

Lord President.—I delivered my opinion very fully on this case before; and, after considering these papers, I remain of the same opinion still, notwithstanding the very able opinion that has just been delivered. With regard to the interest of the pursuer, I have not the least doubt of it. This clause is just part of the machinery by which the other clauses are to be enforced. It is just a contract, the exact implement of which I am entitled to demand. Suppose I make a contract, that a person is to furnish me with a pair of bay horses, and he brings me a pair of black ones, perhaps superior in strength and beauty, and fitter for my work; yet they are not the kind contracted for, and I am entitled to object to them. Or if I contract to get my carriage painted a dark colour, and it is sent home to me painted yellow; it is not enough to say to me that the colour I had fixed on was a bad one, and would cast in a few months, whereas this patent yellow with varnish would be much more durable. My contract was for a particular colour, and I am entitled to insist upon it, although I should be a loser. There is an interest existing in fancy; and in this case there is an indirect interest, by which the clause may be necessary to enforce other clauses in the feu-contract. My brother's mistake is, that he always supposes this to be a stipulation by Blythswood, but it will be recollected this is a mutual contract; and who can say but it may have been a stipulation proposed by the feuars?

I am quite clear that this is a condition essential to the feu.

The Court adhered. *

Harley and Others appealed.

Appellant.—The respondent has not shewn any interest to enforce the clause in question. It confers on him no pecuniary or patrimonial advantage whatever. Indeed, his interest is directly opposite. He has no title to reduce the conveyance in question. His title as superior enables him to claim what is due to him as

superior, but not to call for title-deeds to which he is no party until after confirmation. If he had both interest and title, still he has instituted an incompetent action. His object is, that he shall not be bound to confirm; but he concludes for absolute reduction. The action ought to have been declaratory. The stipulation is illegal—is *pactum illicitum*—is inconsistent with the 20. Geo. II. c. 20. &c.—is not made a real burden on the lands themselves, but a condition personal to the individuals. Even if not considered as a real burden, it is one of the *naturalia feudi*, arising out of the proper relation between superior and vassal; and is besides full of uncertainty, and dangerous to purchasers. The only light in which the provision can be viewed, is that of a prohibition, endeavoured to be made effectual by an irritancy or declarator of nullity in case of contravention. But an irritancy founded on a mere prohibition cannot be enforced against third parties, except by means of a strict entail: it can be made effectual only against the vassals themselves who are parties to the contract with the superior. At common law the superior has no right to require that the vassal shall employ his agent to make out the deeds connected with his feu. Every view of policy or expediency is against it. The contract is unequal, for it is a very questionable proposition, whether a substitute heir of entail can be liable for the misconduct of the agent nominated by a preceding heir of entail.

Respondent.—The clause in the feu-rights stipulating, under the pain of nullity, that the dispositions granted by the vassals shall be written by the superior's agent, creates a legal interest in its observance, which the respondent is entitled to protect by an action in the proper form. This interest is obvious on looking to the other clauses of the contract. The form of action adopted is the proper form for ascertaining and defending that interest. Besides, every rescissory action is truly declaratory. The clause is, both in its nature and form, binding on singular successors; and the objection, that the obligation is not made a real burden on the land, rests on a misapplication of the principle which rules the point. It is a condition of, and burden inseparably attached to the feu-right, and valid in its nature and operation. The contract contains nothing inconsistent with the 20. Geo. III., and the whole statement of the inexpediency and dangerous complexion of the clause in question, is mere declamation. This is a deliberate bilateral contract, which, as there is nothing illegal in its construction, must be fairly and fully implemented. And this remarkable feature attends this discus-

June 29. 1825. sion, that the appellants have never been able to shew any good interest for insisting in the dispute which they have raised.

The House of Lords ordered, ‘ that the cause be remitted back to the Court of Session to review the interlocutors complained of; and it is further ordered, that the Court to which this remit is made, do require the opinions of the Judges of the other Division in the matters and questions of law in this case in writing, which Judges of the other Division are to give and communicate the same; and after so reviewing the interlocutors complained of, the said Court do and decern in this cause as may be just.’*

Lord Gifford.—The only other case remaining for judgment, is that of *Harley against Campbell*. This case arises out of certain feus granted by the trustees appointed under an Act of Parliament for the purpose of selling or feuing the property, out of which the question arises: And, my Lords, they thought fit, in the feus which were granted, to insert various provisions; amongst others, a provision enabling the party to whom the lands were feued, to grant, or dispone, or subfeu the lands, so as that the said lands which shall be so feued or disposed, shall be held immediately of and under the said William Macdowall, Allan Maconochie, and James Walker, the parliamentary trustees; and then it provides, that if the property was subdivided by the feuar, not at the rent reserved, then the annual feu-duty of such parts or portions shall correspond and bear the same proportion to the total feu-duty mentioned in the deed, that the space thereof so sold or disposed bears to the whole space of the lands hereby feued; but in case, by this proportion, the original annual feu-duty of the part or portion of the said lands so sold or disposed, shall come to be less than L. 10 sterling, but more than L. 5 sterling per annum, that it was to be augmented 10 per cent; if it was L. 5 or less, but more than L. 2, then it was to be augmented by an addition equal to 15 per cent; and if it should fall as low as L. 2 sterling, or less than that sum, it was to be augmented to 25 per cent. Then there is a declaration, that all the dispositions or other conveyances of the whole, or of parts or portions of the said lands, shall be recorded in the books of a competent Court, within one month after the date thereof; and then follows this provision—‘ Declaring also, that the said dispositions or other conveyances of the whole, or of parts and portions of the said lands, with the infeftments to follow thereon, shall be made out and extended by the agent of the said trustees, or their foresaids, for the time being, and that at the proper charges of the disponees of the said lands, or of the said disponees or their foresaids; otherwise the same shall be

* See, for the result of the remit, 6. Shaw and Dunlop, p. 679. No. 245.

‘null and void,’ so that the agent of the trustees was to prepare all the conveyances. June 22. 1825.

My Lords,—Mr Harley, who had taken part of this property upon feu, granted it over in various proportions to Mr John More, as cashier of the Royal Bank. The disposition he has made was not prepared by the agent for Mr Campbell; and Mr Campbell brought an action of reduction against Mr Harley and the disponee, to reduce and set aside all those deeds that had been so executed, upon the ground that this provision in the feu to Mr Harley was binding upon Mr Harley, and those who claim under him; that the disposition should have been prepared by Mr Campbell’s agent; and next, that not being so prepared, he has a right to set it aside in toto.

My Lords,—The action came before the Court of Session, and there were various discussions upon it. First, they said that Mr Campbell had no interest to enforce the clause in question; and next it was said, that, if he had an interest, still this was an illegal stipulation; that it was contrary to Act of Parliament mentioned in the papers, and contrary to the public polity; that the Act only authorized the taking of the highest feu-duty that could be obtained. I do not exactly follow the argument of one of the learned Judges in that respect. And then it was said, that the form of the action was bad, because, by reducing, you deprive these parties of the estate. Mr Campbell said, I have an interest to pursue this action, because it is very important to me to see in these sub-feus what the amount of the feu-rent is. They answer, You may see that by the disposition. Lord Gillies is of opinion the form of the action was bad; that it ought to have been an action of declarator, and not an action of reduction to set aside this disposition altogether; he doubted whether it was a real burden, or that Mr Campbell could go against a third person. The other Judges were of opinion that Mr Campbell had an interest to pursue, and that the form of action was right; although, I observe, one of the Judges says he considers it really a process of declarator, it was not in that form—it was an action of reduction: and as to his right to pursue, I should state, that Mr Campbell had been applied to, to confirm those dispositions, and had refused, and had proceeded against the parties for a reduction. He came to the Court, therefore, for his own protection, to get a declaration as to what his rights were.

This question is one of very great importance. I understand that the amount of these feus is very large, and the question is, Whether this comes within the maxim, ‘*Lex neminem cogit ad impossibilia*,’ or whether this is such a real burden that it can be enforced by Mr Campbell against the disponees, to deprive them of the rights they have received from Mr Harley?

My Lords,—Though I am very reluctant, in any of these cases, to delay the parties; still, considering this is a very important case as to property in general, where property of this sort by the law of Scotland can be introduced into a disposition, to bind for all time; and when I

June 22. 1825. consider, too, that the Judges who have decided in favour of Mr Campbell consider it a nice question as to his title to pursue,—I should in this case propose to your Lordships to remit it to the Court below, to have the opinion of the other Judges upon the subject. If it had been a simple case, and of no value in point of importance, I would, notwithstanding the difficulty of the case, have decided it, rather than delay the parties; but in this case, where I see the property is large, and the extent of the principle to be applied to it, it does appear to me to be a very important case; and therefore, although I have formed an opinion, it would be improper for me to say what it is; yet I think, upon the whole, should the case ever come back to your Lordships, which most probably it will not, if I should be called upon to assist your Lordships in the determination of it, I shall come to the determination of it with much more satisfaction if I knew the opinion of all the Judges of the Court of Scotland upon the subject. In this part of the island we are most grateful for all the assistance that can be derived from Scotland upon all questions affecting property of every kind in Scotland; and, therefore, I do express my feeling individually, that I would come to the decision of this case with much greater satisfaction, if I knew the opinion of the collective body of the Judges in Scotland; more especially when I find there is a difference of opinion existing amongst them, and when I find it is a case of a novel description.—Therefore, in this case, I should propose to remit this case generally to the Division of the Court of Session to review their decision, and with a request that they would take the opinion of the other Division of the Court upon the subject,—upon the effect of the law,—and the effect of this disposition, whether it can be enforced against these disponees. They have reduced the deed altogether, the effect of which was what I have stated against these parties. However, whether it be so or not, the Court will have an opportunity, if they adhere to the opinion they have formed, of so deciding upon it. I think I should have been satisfied with the decision of all the Judges of the Court; and if it should come back before your Lordships, your Lordships will have the benefit of the opinion of the collective body of the Court of Session in Scotland.

Appellants' Authorities.—Kames' *Elucidations*, p. 214.; Kerr, Feb. 10. 1630, (3779.); Shaw, March 8. 1759, (7845.); 2. Stair, 3. 54.; Henderson, Aug. 7. 1760, (10,179.); Hill, July 5. 1774, (10,180.); *Creditors of Ross*, June 3. 1714, (ib.); Lovat, House of Lords, April 1. 1721; *Calderwood's Creditors*, July 1730, (10,245.); Allan, July 10. 1780, (10,265.); Stewart, May 18. 1792, (10,232.)

Respondent's Authorities.—4. Stair, 18. 1. 2. 9.; 4. ib. 20. 5.; Sir R. Preston, March 6. 1805, (2. App. Real and Personal); 1. Bell, 30. Note; 1. Bell, 27.

J. CAMPBELL—J. RICHARDSON,—Solicitors.

JOHN VANS AGNEW of Sheuchan, Appellant.

No. 60.

JOHN BELL, W. S. Assignee of the Earl of Stair and Others,
Respondent.

Inhibition—Arrestment.—An heir of entail having been found entitled to restitution of part of the entailed estate from purchasers; and they having brought an action against him for ameliorations, on which they executed arrestments and inhibition; and the heir having a counter action for bygone rents of a much larger amount;—Held, (reversing the judgment of the Court of Session), That the heir was entitled to have the arrestments and inhibition recalled without caution.

THE circumstances from which the present question arose will be found in 1. Shaw's Reports of Appeal Cases, Nos. 50, 51. and 57.; but it may be stated generally, that the House of Lords had ordered certain lands, which had been purchased by the Earl of Stair and others, to be restored to Mr Agnew, as the heir of entail entitled to succeed to them, and their titles to be reduced.

July 4. 1825.

2D DIVISION.

The Court of Session accordingly applied the judgment of the House of Lords; but while the Earl of Stair and the other purchasers submitted to the decree of reduction, they maintained that they had a good defence against the removing, in respect of a claim for ameliorations. On the other hand, Agnew demanded the bygone rents; and after some procedure (during which, of consent, the lands were sequestrated, and a judicial factor appointed) the Court decerned in the removing, reserving all claims for ameliorations and bygone rents, and to Agnew his objections, and recalled the sequestration. The purchasers removed accordingly, and Agnew entered into possession.

The Earl of Stair and others then assigned their claims in trust to Mr Bell, who raised an action against Agnew for payment of these ameliorations, calculated at about L.14,000 or L.15,000, and on the depending action used inhibition and arrestment of the rents of the estates. Agnew prayed the Court to loose the arrestments, and recall the inhibition, without caution; but this the Court refused to do. Agnew then offered caution, 'under reservation of all legal remedies competent to him against the nimious and oppressive use of the diligence in question by the respondent, as well as against the judgment of the Court.' The Court, 31st May 1825, 'in respect that the petitioner (Agnew) has now offered to find caution, and that the respondent has consented that the caution shall be restricted to the sum of L. 6000 sterling, they, upon the petitioner finding sufficient caution to the said amount of L. 6000 sterling, and lodging a bond for the same

July 4. 1824. 'in the clerk's hands, recall the arrestments and inhibition mentioned in the petition, and ordain this interlocutor recalling the inhibition to be marked on the margin of the record, and decern.* The respondent at the same time, by minute, 'reserved all claim which he or his constituents have to the rents, which are or ought to be in the hands of the judicial factor, and all remedies competent for recovering or securing the same.'

Agnew appealed.

Appellant.—The diligence resorted to is nimious and oppressive. When examined, the charge for ameliorations dwindles into half the amount claimed, and the respondents have the security of the balance in the hands of the factor and tenants, besides other sources, and the personal responsibility of the appellant in the enjoyment of a large estate. But, at all events, the respondents are retaining the bygone rents, and it is impossible that they can do so and at the same time demand ameliorations. The effect of the judgment of the Court below is, by locking up the appellant's funds, to reduce him to beggary, after he has been able, at the expense and toil of years of litigation, to wrest from the respondents the inheritance of which he had been unlawfully despoiled. In such, or indeed under much less glaring circumstances, the Court ought to have interfered and released the diligences without caution, particularly when the chance of success in the action is hopeless.

Respondent.—The Court, by their judgment, have exactly followed the course adopted in all like cases. The respondent's constituents have a right to the ameliorations, and a consequent right to resort to such legal diligence as is necessary for their, as for any other creditor's safety. Besides, the Court do not inquire whether or not there is a *probabilis causa litigandi*: it is only necessary that the action be raised *bona fide*. The appellant's personal responsibility is of no value,—he is only proprior of an entailed estate,—and he is at this moment disputing the respondent's rights to the bygone rents. The respondents have not been actuated by invidious motives; but large properties have been evicted from them without any fault on their part, and it is only the exercise of common prudence to take care that the little they can look for, as indemnification for the productive outlay on the estates which have passed from them, should not be lost by the interference of other creditors, or the appellant's profusion.

* See 4. Shaw and Dunlop, No. 40.

The House of Lords ordered and adjudged, ' that the interlocutor complained of, so far as it requires caution, be reversed. And it is farther adjudged, that the arrestments and inhibition be recalled without caution.' July 4. 1825.

LORD GIFFORD.—My Lords, There is a case which waits for your Lordships' determination,—of John Vans Agnew, Esq. appellant, and John Bell, writer to the signet, trust-assignee of the trustees of John Earl of Stair, and others, respondent. My Lords, in the interlocutor of the Lords of Session, they find,—' The Lords having advised this petition, with the answers thereto, mutual minutes put in for the parties, in respect that the petitioner has now offered to find caution, and that the respondent has consented that the said caution shall be restricted to the sum of L. 6000 sterling, they, upon the petitioner finding sufficient caution to the said amount of L. 6000 sterling, and lodging a bond for the same in the clerk's hands, recall the arrestments and inhibition mentioned in the petition, and ordain this interlocutor recalling the inhibition to be marked on the margin of the record, and decern.' Then the question, my Lords, is, whether the Court of Session ought not to have exercised that discretion, which they were at liberty to do, without the security, which I have stated to your Lordships, being given to them?

My Lords,—This proceeding has arisen out of a case which was before your Lordships in 1822; and your Lordships, by your judgment then, determined, with reference to certain lands of Barnbarroch or Sheuchan, the estate in question, ' that all the proceedings in the said Court in the said action of declarator and sale, so far as they affected the interests of the said minors in the said estates respectively under the deed of the entail in the said Act, and the said proceedings mentioned, were proceedings without authority for that purpose required by the provisions in the said Act of Parliament, and were therefore null and void as against the appellant, and the several other minor heirs of entail; and particularly, that the sales made by the said Court, in pursuance of the several interlocutors pronounced by the said Court in the said action of declarator and sale, were null and void as against the appellant and the said several other minor heirs of entail.' Originally your Lordships determined, that he was entitled, ' on behalf of himself and the said several minor heirs of entail, to have the sales made under the several interlocutors aforesaid reduced, and to have the lands restored to him, along with the rents from the period of his accession to the entailed estates, subject to such proceedings as may be had in an action to be instituted in the said Court, under the authority of the said Act, for the purpose of inquiring into and ascertaining the extent and amount of the debts owing by the said John Vans Agnew at the time of his death.' That part of your Lordships' judgment which related to the

July 4. 1825. rents was afterwards altered, your Lordships omitting the words 'along with the rents from the period of his accession to the entailed estates,' and inserting instead thereof the words 'without prejudice to any question which may be made in the further proceedings in the Court of Session touching the rents of the entailed estates, and the application thereof; during any period of time.'

My Lords,—Upon this case going back to the Court of Session, proceedings were had on the part of the persons who had purchased the lands, for the purpose of resisting the giving the appellant possession of the estate, on the ground that they were entitled to retain possession of the lands until they were compensated for certain improvements or meliorations made on that land. In consequence of a claim on their part, proceedings were had in the Court of Session, which went on till the autumn of last year, and the Court of Session finally adjudged, that the claim of meliorations was no answer to the giving up of the property to him to whom the right had been adjudged by your Lordships. But, my Lords, an action was shortly after instituted by the present respondent, as the trust-assignee of the trustees of John Earl of Stair, and others, on the ground of claims for meliorations for not less, I think, than L.14,000. That action was raised by him asking of the Court of Session to make the present appellant personally answerable for the amount of those meliorations, although some part of those meliorations, it was admitted, had taken place prior to the time at which he was entitled to possession.

In consequence of that action having been preferred, an inhibition and other proceedings took place, and the present appellant thereupon applied to the Court of Session, upon the ground that, under the circumstances of the case, the Court of Session ought not to impose upon him the necessity of paying for those meliorations which had taken place upon the estate. My Lords, I would here state to your Lordships, that a minute was given in for John Vans Agnew in his application for recall of arrestments and inhibition against the respondent, and which was to this effect:—'That the Court having, in this case, been pleased to find that the diligences of arrestment and inhibition used by the respondent ought to be recalled in hoc statu with caution, and the respondent refusing to consent to the recall without caution to the extent of L. 6000, the petitioner, considering that the whole rents are locked up, is advised to offer caution to that extent, or any smaller sum which your Lordships may think proper, under reservation of all legal remedies competent to him against the nimious and oppressive use of the diligences in question by the respondent, as well as against the judgment of the Court.' My Lords, upon looking into the nature of this consent on the part of Mr Agnew, it appears to have been made under an express protest by Mr Agnew as to his right of bringing an appeal before your Lordships; so that I think you will conceive he has not by that consent precluded himself from contesting the judgment of the Court of Session. My Lords, indepen-

dently of the doubt that may arise upon that judgment, as to which I wish to guard myself by stating, that I do not intend to give any opinion upon it, the question before your Lordships being, as I conceive, whether, under all the circumstances of the case, the Court below would not have better exercised their discretion by removing the arrestments and inhibition? July 4. 1825.

My Lords,—It is admitted, though I do not mean to say conclusively, but in the proceedings before your Lordships' House a statement was made, that the rents claimed would amount to a sum of nearly L. 60,000; but I believe I may take it, from what has subsequently appeared, at L. 40,000, which has been received by the purchasers since the time Mr Agnew and his ancestors have become entitled to the estate. My Lords, these rents have been claimed in the manner which I have stated, and the purchasers seek to charge Mr Vane Agnew personally for the meliorations—they seek to charge him personally for interest, overcharges, &c. Now, my Lords, under these circumstances, I would, without prejudice to the question that may hereafter arise, say, that this is a case almost of the first impression, an action having been brought for meliorations; and it may be a question, whether in a proceeding for the meliorations, where the parties are seeking to retain rents, on the grounds upon which that action is attempted to be founded, it can be sustained? but, at all events, it is attended with circumstances that shew that it is an action which deserves great consideration in the Court below, both as to its general principle, and—especially considering the particular circumstances of the case—considering the amount of the rents, it is an important question, whether they have or have not a right to retain those rents, and claim meliorations also? Under all these circumstances, I must confess it does appear to me, that the judgment of the Court of Session ought to be reversed. I should propose, therefore, to your Lordships to reverse the interlocutor, so far as it relates to the appellant being called upon to find caution.

My Lords,—I have already stated that this case is one of some novelty; but I have the satisfaction to know, that certain noble and learned Lords, who are in the habit of advising your Lordships in matters of this kind, and with whom I have conferred, agree with me in the opinion I have expressed. I mention this, my Lords, in consequence of the peculiarity of the proceedings, and in justification to myself, under the circumstances in which I am placed, for offering the opinion I have done for your Lordships' adoption.

LORD REDSDALE.—My Lords, It is admitted, that the Court of Session has a right, in a case like the present, to exercise its discretion. Now it does seem to me, that if ever there was a case in which that discretion ought to have been exercised in the manner contended for by the appellant in this case, this is that case. My Lords, the object of the present proceeding is upon a sup-

July 4. 1825. position that the party who is suing cannot obtain the benefit of his suit; to effect which, proceedings have been taken so as to stop the payment of the rents that are due by the purchasers, or by the tenants from whom the rents are so due, and preventing the appellant receiving that which he is justly entitled to demand; or in other words, preventing him receiving that benefit which he considers himself entitled to by the suit which he had instituted. Now, in this case, my Lords, the question whether the appellant is entitled to the bygone rents of the land for the long period of fifteen or sixteen years, is a question now depending in the Court of Session; and I confess, that question being so depending, it does appear to me a most extraordinary thing, that by an assignment of what would be a set-off against that question, or a distinct substantive demand against the person who has obtained the judgment of the House upon this part of the case, especially in the manner in which this assignment is endeavoured to be made, a conclusion should have been arrived at similar to that under your Lordships' consideration. It may be insisted, that if there had not been a bona fide possession, there could be no doubt that the claimant had a right to recover the bygone-rents, as well as the estate itself; and if, on the other hand, there had been a bona fide possession, the question would be, when did that bona fide possession cease—that possession which has now ceased,—the Court having adjudged, with respect to those claims for meliorations, that the party who makes that claim had no right to detention. If it had been a distinct substantive claim against the party, the claimant would have had a right of detention; therefore it strikes me, that the judgment which the Court has pronounced, that there was no right of detention—the Court having decided that, it becomes a question of a very peculiar description, which can only be entered into upon a discussion of the whole subject. With respect to the bygone rents, if the appellant in this case is entitled to bygone rents, then it becomes a question of set-off; but with respect to which, it may be different with regard to every one of the parties; and their rights being necessarily so different, how they can be consolidated in one action is a question which I really find great difficulty in answering; but that is a question to be decided when the case shall come to a hearing upon this action for the meliorations.

My Lords,—With reference to the assertion, that the receipts of rents and profits in the hands of a bona fide possessor ought to go in discharge of meliorations, my Lord Bankton, who is high authority, has affirmed, that there is nothing to the contrary to be found in the law of Scotland, and no decision to the contrary has been cited: there are cases cited in which it has been determined, that, to satisfy an adjudication, the bygone profits by a bona fide possessor shall be so applied, and which seem to me in principle and substance to be the very same case. Reference has been made to the civil law: if your Lordships will look into any writer on the civil law, their authority is clear and precise,

July 4. 1825.

that the rents in the hands of a bona fide possessor must be so applied, and in the manner in which the fruits that have been received have been consumed, as in these meliorations: if there were meliorations beyond the bygone rents, that might be another question, supposing the question did not arise with respect to personal obligation with reference to the person who is the appellant in this particular suit. My Lords, it seems to me therefore, that, independently of that consideration, the Court of Session was very much called upon to exercise its discretion upon this subject, and to have discharged the arrears. But, my Lords, when it is considered with a view to the personal liability of the present appellant, it does seem to me to be a most important question; because what has been done amounts to this, that if Mr Vans Agnew had died within a few months after he had obtained your Lordships' decision in his favour, he benefiting nothing by that decision, the decision being of no value whatever to him, he would have been personally answerable for meliorations to the amount of L.10,000 or L.12,000; because, by his death, the interest in the estate would have ceased, and he would have had no enjoyment whatever. Your Lordships knew, with respect to the question that has been raised, what has been the consequence with regard to the property of the late Duke of Buccleuch? The late Duke of Buccleuch impeached the validity of certain leases. He did not live to the very day when the judgment of your Lordships' House was obtained in his favour. He died shortly before the judgment was pronounced, and which judgment was afterwards given in favour of his son. The question of bygone rents was there agitated, and it was said, that the lessees were bona fide possessors; and the representatives of the late Duke, though entitled in law to a reduction under the deed, the judgment in that case would have become a nullity, if there had been meliorations to a considerable extent, and if the representative of the late Duke, after your Lordships' decision, had been compelled to have become personally answerable for meliorations.

Now, my Lords, I think the claim made for these meliorations by an assignee taking an assignment of different persons, is a question so extremely difficult, that if there ever was a case in which the Court assumed a discretion with respect to the claim now made, this was one in which it ought to have been exercised. My Lords, the amount of the rents during the time are not precisely ascertained, but they have been represented in the course of these proceedings, and the fact is not denied, that they amount to L. 60,000, the rents received by the persons who have assigned this demand for meliorations, which was L. 10,000; that the rents they have received during the time they have been in the perception of them, and therefore enjoying all the benefit of the estate during that time, amount to L. 40,000,—that is, very nearly four times the amount of what they demand for meliorations. Under these circumstances, therefore, it does appear to me, as the Court had a discretion, it was a proper case for the Court of Session

July 4. 1825. to have exercised its discretion, especially when it is considered what is the probable effect, in a case of this description, by the Court coming to the conclusion they have done, namely, suspending the whole income to which this party is entitled, and thereby, in effect, might prevent this person prosecuting his demand, for want of the means of doing so. Under these circumstances it does occur to me, that we ought to reverse the judgment of the Court below, without caution, there being most probably a large sum in the hands of the persons themselves to meet any demand which can possibly be made against them.

I see that the parties go before the time that Mr Vans Agnew was entitled to possession of the estate. During that time, it seems to me, that person can no more claim these meliorations than Mr Vans Agnew's father could have claimed them. Unquestionably, if they had proceeded regularly under the statute, the case might have been different; but not having proceeded under the statute, he can stand in no better situation than Mr Vans Agnew's father himself could have stood: For these reasons, my Lords, perfectly concurring in the opinion that the noble and learned Lord who preceded me has expressed,—considering that this was a case in which the Court of Session ought to have exercised its discretion, I think your Lordships ought to discharge the arrestment without caution.

Appellant's Authorities.—2. Stair, 1. 22.; 2. Ersk. 1. 25.; Morr. Dict. 7. Bona et Mala Fides, p. 1770. et seq.; 1. Bank. 8. 25.; Hamilton, March 4. 1823, (2. Shaw and Dunlop, No. 241, 242. and ante, No. 43.)

Respondent's Authorities.—Duke of Gordon v. Innes Binning, Jan. 18. 1676, (13,401.); Rutherford, Feb. 28. 1782, (13,422.); Creditors of Brough, Nov. 26. 1793, (2585.); 1. Stair, 8. 6.; 3. Ersk. 1. 2.; 4. Stair, 50. 21.; 2. Ersk. 11. 3.; 1. Bank. 7. 134.; 3. Stair, 1. 33.; 3. Ersk. 6. 12.; 3. Bank. 1. 37.; Earl of Stair, Dec. 21. 1822, (2. Shaw and Dunlop, Nos. 105. and 106.)

J. FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 61. ALEXANDER GRANT, Solicitor in London, Appellant.
Brougham—Rose.

JAMES PEDIE, W. S. Respondent.—*Adam—Wilson.*

Jurisdiction—Forum Originis.—The Court of Session having sustained their jurisdiction against a Scotchman domiciled in England *ratione originis*,—the House of Lords reversed the judgment, and remitted to inquire on what other grounds, appearing on the pleadings, jurisdiction could be sustained, and having regard to a suit depending in Chancery when the summons in Scotland was raised.

ALEXANDER GRANT was a Scotchman by birth, but since 1803 had resided in London; and followed the profession of a solicitor there. He had no heritable property in Scotland.

July 5. 1825.

1ST DIVISION.
Lord Alloway.

In 1813, he and Malcolm M'Farlane (who soon afterwards died) were appointed trustees, under a disposition and assignation by Francis Allwood, an Englishman, carrying on business as a cotton spinner in Glasgow, of his whole estates, heritable and moveable, (including the estate and effects left to him by a deceased brother Philip), for payment of his, Francis Allwood's, creditors. The disposition was drawn in the Scotch form by a Scotch man of business, but was subscribed by the party and witnesses at Carlisle. It contained a clause of registration in the Scotch form, and the deed was accordingly registered in the books of Council and Session. In the meanwhile, in October 1812, Francis Allwood, and others having an interest under Philip's will, had charged upon their respective interests an annuity in favour of the Rev. Robert Hele Selby Hele, (to whom also Francis granted a separate annuity charged on his individual interest); and intimation thereof was given to Grant in January 1814. Hele then filed a bill in the Court of Chancery in England, and made Grant, Francis Allwood, and Thomas Black,* defendants,—both the two last persons being out of the jurisdiction of the Court. Grant (as he alleged on a consultation with Hele) transmitted to the respondent Pedie the subpoena out of Chancery at Hele's instance, with directions to obtain letters of supplement against Allwood and Black, and received an answer, that the letters had been raised, and had been sent for execution, which, when returned with the messenger's execution, would be retransmitted to Grant. The bill prayed, that the defendants should be required to assent to, or dissent from, a proposed agreement and settlement; if the latter, that 'an account may be taken, 'under the direction of this honourable Court, of what has been 'received by the said Alexander Grant and Malcolm M'Farlane, 'or either of them, as such trustees or trustee, as aforesaid; and 'that, out of what shall be found due upon taking the said accounts, the arrears due upon said annuities may be paid; and 'that the residue thereof may be paid into the bank, in the name 'of the accountant-general, to the credit of this cause, and may 'be set apart for the purpose of securing to your orator, Robert 'Hele Selby Hele, the future payments of the said annuities;

* Francis Allwood had been sequestrated in 1803, and Black appointed trustee; but it was alleged, that Black had paid the creditors 20s. in the pound.

July 5. 1825. ' and that the moiety of the said annuity of L. 278, and the said annuity of L. 40, may be declared to be a charge upon the reversionary interest of the said Francis Allwood, in the sum of L. 4128. 3s. 2d. 3 per cent Consolidated Bank Annuities, and L. 3500 Navy 5 per cents; and that your orator may have such further and other relief in the premises as to your Lordship shall seem meet, and the nature of the case may require. May it therefore please your Lordship, the premises considered, to grant unto your orator his Majesty's most gracious writ or writs of subpoena, issuing out under the seal of this honourable Court, to be directed to the said Alexander Grant, Thomas Black, and Francis Allwood, and the rest of their confederates, when discovered, thereby commanding them, personally, to be and appear before your Lordship in this honourable Court, and then and there, full, true, and perfect answer make to all and singular the premises; and farther, to stand to, perform, and abide such order and decree therein, as to your Lordship shall seem meet.'

William Thomson, ironmonger in Edinburgh, was debtor to the respondent Pedie; and in security of his debt, John Thomson and Company, (the partners of which were William's brothers), being creditors of Allwood for L. 241. 6s. 2d. assigned their claim to Pedie, who intimated the assignation personally to Grant, at that time in Edinburgh. Demand for payment of a dividend on this claim having been unsuccessfully made thereafter upon Grant, Pedie, in order, as he alleged, to constitute his debt, with a view to execute diligence against part of the trust-estate in Scotland, raised, on the 11th April 1821, in the Court of Session, a summons against Grant, concluding for payment of L. 72. 7s. 9½d., being a composition of 6s. per pound on the total debt of L. 241. 6s. 2d. Grant being in London, was edictally cited, by affixing a copy of the summons on the market-cross of Edinburgh, and by intimation being made at the pier and shore of Leith. He entered appearance; and stated in defence, 1st, ' The defender is not answerable to the jurisdiction of this Court, having no heritable estate situated in Scotland; neither has he a domicile or residence there. The defender has claims against individuals in this country, but the pursuer has not founded a jurisdiction against him jurisdictionis fundandæ causa. The action therefore falls to be dismissed as incompetent, with expenses. But, 2dly, Although the action was competent, the defender denies positively the statement made in the summons. On the contrary, the pursuer is in the defender's debt.'

The Lord Ordinary sustained the jurisdiction, and ordered parties to be heard on the merits; and afterwards adhered, (27th January 1822), 'in respect that it is not denied that the defender is a Scotchman, although he has resided for some years past in England, and that the contract or obligation upon which the action proceeds, took place in Scotland;' and on advising a reclaiming petition and answers, the Court (14th June 1822) adhered, in so far as the interlocutor reclaimed against sustains 'the jurisdiction *ratione originis*, and the forum thereby created;' and found expenses due to the pursuer relative to the discussion of the question of jurisdiction.*

Grant appealed.

Appellant.—The appellant, though a Scotchman born, is domiciled in England, and is resident there *animo remanendi*. A Scotchman or Englishman out of Scotland, cannot be heard in a Scottish Court as a pursuer, until he has sisted a mandatory; neither can the latter be called as a defender, (he having no heritage in Scotland), unless there has been an arrestment of his moveables in Scotland to found jurisdiction. But it would be an unjust principle to put in a different situation a Scotchman, domiciled *animo remanendi* out of Scotland. If a Scotchman living out of the jurisdiction is, when claiming a right, placed on the same footing with a foreigner, why should a distinction be taken when they are called as defenders? The most oppressive consequences would result from the rule adopted by the Court below. Under an edictal citation, a decree might be obtained against a party in utter ignorance of its existence, his moveable estate carried off, and his person exposed to imprisonment should he happen to return; and however unjust the claim might be, or whatever might be its amount, no remedy could be had, if the decree were fortified by the lapse of the legal prescription. The ratio of the Lord Ordinary, that the contract took place in Scotland, is not founded on fact. That ratio has been recalled, and there is no case in the books where the mere origin, unaided either by the locality of the contract, or some other circumstance, has been allowed to found jurisdiction; on the contrary, there are various authorities in favour of the appellant's doctrine.

Respondent.—1. A native of Scotland, residing abroad, is not

* See 1. Shaw and Ballantine, No. 544.

July 5. 1822. regarded as a foreigner; but is liable to the jurisdiction of the Scotch Courts, *ratione originis*, and his property within their territory is open to attachment by Scotch diligence. This is founded on legal principle, and is settled by all the authorities, and is daily observed in practice. 2. If the *forum originis* was not sufficient *per se* to found a jurisdiction, still, as the transaction on which the summons rested took place in Scotland, this, taken in connexion with the *forum originis*, constitutes jurisdiction.

The House of Lords 'ordered and adjudged, that the interlocutor of the 14th of June 1822 complained of be reversed; and it is further ordered, that the cause be remitted back to the Court of Session to rehear the reclaiming petition of the 15th February 1822, whereby the several interlocutors of the Lord Ordinary complained of are submitted to review, for the purpose of the Court's again considering and adjudging whether the jurisdiction of the Court can be sustained, according to those interlocutors of the Lord Ordinary, upon the grounds mentioned in any of them, or on any other grounds appearing in the pleadings, other than those founded upon the *domicilium originis*; and having regard to the fact of a suit or suits depending in the Court of Chancery of England, and the period or periods of the commencement thereof, if it shall appear that the pursuer could therein recover his demand, if he had any just demand; and, after such rehearing, to proceed as to such interlocutors of the Lord Ordinary, and in the cause, as is just.'

LORD CHANCELLOR.—My Lords, There is a Scotch cause, upon which I shall take the liberty of troubling your Lordships, with your leave, to-morrow,—the case of *Grant v. Pedie*, which involves no less a question than whether, if a man is born in Scotland, and he leaves it, and is domiciled out of Scotland, for a period as long as your Lordships please to suppose, he is, merely because he was born in Scotland, to be considered as a Scotchman from the hour of his birth to the day of his death. This is certainly a very important question, if the Court of Session is right in considering that no Scotchman can, as to a suit, change his domicile of origin. Your Lordships are very well aware that there is a law of Scotland, under which, if the defender has a real estate in Scotland, or if he has goods in Scotland, or if a contract upon which a party sues be a contract formed in Scotland, that, following particular forms, those circumstances would undoubtedly give a jurisdiction to the Court of Session. But the question here, unless there are particular circumstances that

I have not yet been able to discover in the case, is really simply of July 5. 1825. this nature, Whether a person, leaving Scotland (if you please so to state it) in his infancy, still continues, for the purposes of a suit, a Scotchman? And when I say that, perhaps I may take the liberty to suggest to your Lordships, that, since the Unions, we are all Scotch, English, and Irish. There is a mixture of the three national characters in every one of us. There is a little bit of Irish, and a little bit of Scotch, and a little bit of English; and the question is this, Whether a Scotchman may have a judgment pronounced against him in his absence,—being neither represented by his being in Scotland in person himself, nor having any property whatever there, nor having entered into a contract there,—whether, in the course of the proceedings, a judgment may be pronounced against him in Scotland? and whether, having got that judgment against him in Scotland, the pursuer may bring an action on the foundation of that judgment against the party in this country? And that question also arises connected with a very particular circumstance, that there had been already a suit in this country, in which this debt might have been recovered. Under these circumstances, and feeling as one ought to do, that great care should be taken how any judgment is expressed altering any judgment of the Court of Session, I shall, with the leave of the House, draw this up specially, and present it to the House in the course of to-morrow.

LORD CHANCELLOR.—My Lords, There is a cause which I took the liberty of mentioning to your Lordships on a former occasion, which is the case of Alexander Grant, Esq. a solicitor or agent in London, appellant, and James Pedie, Esq. writer to the signet in Edinburgh, respondent. My Lords, the question in this case is, Whether the Court of Session in Scotland are right (in the judgment of your Lordships) in holding, as they have done in the following interlocutor pronounced by the Lord Ordinary, and confirmed by the Court of Session upon appeal, so far as the same sustains the jurisdiction *ratione originis* thereby created, that, ‘having considered the representation, together with the answers thereto, and the whole process, in respect that it is not denied that the defender is a Scotchman, although he has resided for some years past in England, and that the contract or obligation upon which the action proceeds took place in Scotland, refuses the representation, and adheres to the former interlocutor complained of.’ It does not appear that the appellant had any property in Scotland, and it does appear that he has been long domiciled in England; and the question is, Is he, or is he not, now, though born in Scotland, yet *ratione originis*,—that is, having been born in Scotland,—an object of jurisdiction of the Courts of Scotland? It may be necessary, on account of the great inconvenience, to know whether a man domiciled in England can or cannot be sued in Scotland. The Lord Ordinary does not consider the *ratio originis* as sufficient, but he states the ground of his judgment, that the contract was made

July 5. 1825. in Scotland. Now I see that it is laid down in books of more or less authority treating upon the law of Scotland, that not only the contract should be made in Scotland, but that the party should be found in Scotland. It is a different thing where there is real property in Scotland, or moveable property, that might be made the ground of jurisdiction—it is very different from a contract merely entered into by a party not resident in Scotland, nor having any heritable estate situated there. But, my Lords, with a view to have this question farther considered, I should propose that your judgment should be to reverse the interlocutor of the 14th June 1822, in so far as the same sustains the jurisdiction *ratione originis*, and to refer the cause back to the Court of Session, or to the particular Division which pronounced the interlocutor appealed against, and to reconsider the reclaiming petition of June 1822, which had been presented against the interlocutor pronounced by the Lord Ordinary, and which was complained of;—to have it again submitted to their consideration, whether the jurisdiction of the Court can be exercised according to the grounds proceeded on by the Lord Ordinary, or upon any other grounds repelling the defence, or on any other grounds except proceeding upon the *ratio originis*; having regard to the fact, which appears to me to be a most important consideration, whether there was not one or more suits pending in the Court of Chancery in London, and therefore with a chance of having different suits depending at one and the same time; and it will be necessary to consider the time or period at which such suits were instituted, and whether the pursuer could have recovered his demand by such suit pending; and after such re-hearing, to proceed to make such order as in their wisdom should be deemed just and proper to be made under the circumstances of the case.

Appellant's Authorities.—2. Voet, 1. 48.; 1. Ersk. 2. 16. & 19.; Hogg, June 7. 1791, (4619.); Strother, July 1. 1803, (No. 4. Ap. For. Comp.); Bank of Scotland, Jan. 20. 1813, (F. C.); Brog, March 23. 1839, (4816.); Anderson, July 1747, (4779.); Fairholme, Jan. 31. 1755, (2778.); Brunsdone, Feb. 9. 1789, (4784.); French, June 13. 1800, (No. 1. Ap. For. Comp.); Wyche, June 27. 1801, (No. 2. Ib.); Morecombe, June 27. 1801, (No. 3. Ib.); Edmonstone, Forbes, and Levett, June 1. 1816, (F. C.)

Respondent's Authorities.—Kames' Stat. Law, Hist. Notes, No. 7.; 5. Voet, 1. 91.; Dirleton, 280.; 1. Ersk. 2. 19.; Galbraith, Nov. 15. 1626, (4813.); Balbirnie Feb. 27. 1663, (Ib.); Blantyre, Dec. 8. 1626, (Ib.); Dyell, Feb. 8. 1632, (3714.); Douglas, Feb. 1. 1642, (4816.); Anderson, July 1747, (4779.); Hogg, June 27. 1760, (4760. & 7674.); Fairholme, Jan. 31. 1755, (2778.); Frie, March 6. 1796, (4594.); Lindsay, Jan. 26. 1807, (No. 6. App. For. Comp.); M'Kensie, March 8. 1810, (F. C.); Haig, May 26. 1812, (F. C.); 6. Bell on Deeds, 22, 23. 29.; Styles of Jurid. Soc.; Hope's Min. Pr. 14.; Off. of Mem.

KING—J. FRASER,—Solicitors.

INDEX OF NAMES

TO

VOLUME I.

<i>Appellants.</i>	<i>Respondents.</i>	No. Page.
Agnew, John Vans	Bell, John	60 709
Altchison, John	Glasgow, Magistrates of	18 153
Breadalbane, Earl of	Russell, C. (Campbell's Trustee)	54 621
Brown, Jean, and Curator	Bogle, Mary, and Husband	35 818
Callum, Hugh	{ Ferrier, Charles (Scotch Pat.	
Cathcart, Sir Andrew	{ Cooperage Co.'s Trustees)	40 399
Cooper, Alexander	Cassillis, Earl of, and Others	30 239
Cooper and Co. W. & A.	Campbell, Margaret, & Others	15 131
Cunninghame, James	Kerr, James (Meek's Trustee)	29 233
	Cunninghame, Robert	13 103
Dalglish, William	Athole, Duke of, and Others	51 590
Dewar, Hugh, and Others.	{ Campbell or M'Kinnon, Mrs E.	19 161
Trustees of John M'Kin-		
non Campbell	Monkland Canal Company	55 636
Dixon, William	Glassford, James	36 323
Douglas and Co. J. T. & A.	Mitchell, Mrs Summers or, &c.	26 203
Duguid, John	Lord Advocate	53 608
Duncan, James	M'Gavin & Co.	2 4
Dunn, William		
Forbes, James, and Others	Smyth, Francis	50 583
Forbes, William, and Tutors	Livingstone, John, and Tutor	56 657
Fullarton, Hon. Marianne M.	Hamilton, Sir Hew Dalrymple	42 410
Fullarton, Hon. Marianne M.	Hamilton, Sir Hew Dalrymple	43 581
Glamis, Lord	{ Paul, Sir J. D. & Others, (Earl	
Gordon, Duke of	{ of Strathmore's Trustees)	21 183
Graham, John	Gillan, Rev. James	32 295
Grahame, Sarah, and Husband	Writers to the Signet	45 538
Grant, Alexander	Grahame, Francis	38 353
Guthrie, William	Pedie, James	61 716
	Curl, J. and Others	28 191
Hamilton, Alexander	{ Richmond, James, and Others,	
Harley, William, and Others	{ (Lindsay's Trustees)	6 35
	Campbell, Archibald	59 690

<i>Appellants.</i>	<i>Respondents.</i>	<i>No.</i>	<i>Page.</i>
Jeffrey, W. (Jamieson's Trustee)	Ure, John, and John Miller	47	565
Ker's, Lady E. Trustees	Bellenden and Others	39	381
Maberly & Co.	Bank of Scotland	3	10
M'Arthur, Peter	Jameson, Andrew, and Others	8	59
Mackay, Major	Reay, Eric Lord	33	306
M'Douall, Andrew	M'Dowall, Alexander	5	22
Maule, Hon. W.	Maule, Fox	31	266
Minto, Earl of	Elliot, Sir William F.	58	678
Moncreiff, Lieut.-Gen. George	Tod, William, and P. G. Skene	27	217
Moncreiff, Lieut.-Gen.	Skene, Patrick George	57	673
Montrose, Magistrates of	Mill, John	48	570
Montrose, Magistrates of, and Ewen's Trustees	Ewen, Elizabeth	52	595
Morrison, David, and Others, (Turnbull's Trustees)	Robertson, William	17	143
Orr, James, and R. Harwood	Hance, Son, and Weise	28	237
Onchterlony, John	Officers of State	44	533
Pearson, Patrick	Jack, William	49	577
Pentland, George	Glass, Walter Stirling	9	65
Pitcairn, John	Drummond, David	24	194
Reid, James	{ Hope, Robert, and Others, (Hope's Trustees)	20	172
Roxburgh, Duke of	Waldie, George	1	1
Roxburgh, Duke of	Wauchope, James, and Others	7	41
Rundell, Bridge and Rundell, and Others	{ Montgomerie, Hon. La. Mary, and Husband.	14	112
Smyth, Æneas	Ogilvies, Clementina and Mary	34	315
Solicitors S. C. of Scotland	Writers to the Signet	37	348
Stair, Earl of	Stair, Earl of, (Trustees of)	11	72
Stewart, Sir M. Shaw, & Others	Lead, John	10	68
Stirling, W. and Others	Houston, Mrs, and Others	25	199
Strathmore, Earl of	{ Paul, Sir J. D. & Others, (Earl of Strathmore's Trustees)	41	402
Taylor, William	Kerr, James (Taylor's Trustee)	4	21
Turnbulls, Mary & Elizabeth	Tawse, J. (Turnbull's Trustee)	12	80
Watson, Thomas, and Others, (Stormonth's Trustees)	Stormonth or Darling, Mrs	22	188
Wemyss, James	Hay, Hugh	16	140
Winchelsea, E. of, & Others, Trustees of Lady E. Ker	{ Bellenden, Hon. Henrietta, and Others	39	381
Young, Ross, Richardson & Co.	Ramsay, John	46	560

<i>Respondents.</i>	<i>Appellants.</i>	No.	Page.
Athole, Duke of, and Others	Dalglish, William	51	590
Bank of Scotland	Maberly & Co.	3	10
Bell, John	Agnew, John Vans	60	709
Bellenden, Hon. Henrietta, and Others	Winchelsea, E. of, & Others, (Trustees of Lady E. Ker)	39	381
Bogle, Mary, and Husband	Brown, Jean, and Curator	35	318
Campbell, Margaret, & Others	Cooper, Alexander	15	131
Campbell or M'Kinnon, Mrs E.	Dewar, Hugh, and Others, (Trustees of John M'Kin- non Campbell)	19	161
Campbell, Archibald	Harley, William, and Others	59	690
Cassilis, Earl of, and Others	Cathcart, Sir Andrew	30	239
Cunninghame, Robert	Cunninghame, James	13	103
Curl, J. and Others	Guthrie, William	23	191
Drummond, David	Pitcairn, John	24	194
Elliot, Sir William F.	Minto, Earl of	58	678
Ewen, Elizabeth	Montrose, Magistrates of, and Ewen's Trustees	52	595
Ferrier, Charles (Scotch Pat. Cooperage Co.'s Trustee)	Callum, Hugh	40	399
Gillan, Rev. James	Gordon, Duke of	32	295
Glasgow, Magistrates of	Aitchison, John	18	153
Glass, Walter Stirling	Pentland, George	9	65
Glassford, James	Douglas and Co. J. T. & A.	36	323
Grahame, Francis	Grahame, Sarah, and Husband	38	353
Grahame or Ewen	Ewen's Trustees	52	595
Hamilton, Sir Hew Dalrymple	Fullarton, Hon. Marianne M.	42	410
Hamilton, Sir Hew Dalrymple	Fullarton, Hon. Marianne M.	43	531
Hance, Son, and Weise	Orr, James, and R. Harwood	28	227
Hay, Hugh	Wemyss, James	16	140
Hope, Robert, and Others, (Hope's Trustees)	Reid, James	20	172
Houston, Mrs, and Others	Stirling, W. and Others	25	199
Jack, William	Pearson, Patrick	49	577
Jameson, Andrew, and Others	M'Arthur, Peter	8	59
Kerr, James (Taylor's Trustee)	Taylor, William	4	21
Kerr, James (Meek's Trustee)	Cooper and Co. W. & A.	29	233
Lead, John	Stewart, Sir M. Shaw, & Others	10	68
Livingstone, John, and Tutor	Forbes, William, and Tutors	56	657
Lord Advocate	Duncan, James	53	608

<i>Respondents.</i>	<i>Appellants.</i>	No.	Page.
M'Dowall, Alexander	M'Douall, Andrew	5	22
M'Gavin & Co.	Dunn, William	2	4
Maule, Fox, Esq.	Maule, Hon. W.	31	266
Mill, John	Montrose, Magistrates of	48	570
Mitchell, Mrs Summers or, &c.	Duguid, John	26	203
Monkland Canal Company	Dixon, William	55	636
Montgomerie, Hon. L. Mary, } and Husband	Rundell, Bridge and Rundell, and Others	14	112
Officers of State	Ouchterlony, John	44	533
Ogilvies, Clementina and Mary	Smyth, Æneas	34	315
Paul, Sir J. D. & Others, Earl } of Strathmore's Trustees	Glamis, Lord	21	183
Paul, Sir J. D. & Others, Earl } of Strathmore's Trustees	Strathmore, Earl of	41	402
Pedie, James	Grant, Alexander	61	716
Ramsay, John	Young, Ross, Richardson & Co.	46	560
Reay, Eric Lord	Mackay, Major	33	306
Richmond, James, and Others, } (Lindsay's Trustees)	Hamilton, Alexander	6	35
Robertson, William	Morrison, David, and Others, (Turnbull's Trustees)	17	143
Russell, C. (Campbell's Trustee)	Breadalbane, Earl of	54	631
Skene, Patrick George	Moncreiff, Lieut.-Gen.	57	672
Smyth, Francis	Forbes, James, and Others	50	583
Stair, Earl of, (Trustees of)	Stair, Earl of	11	72
Stormonth or Darling, Mrs	Watson, Thomas, and Others, (Stormonth's Trustees)	22	188
Tawse, J. (Turnbull's Trustee)	Turnbells, Mary & Elizabeth	12	80
Tod, William, and P. G. Skene	Moncreiff, Lieut.-Gen. George	27	217
Ure, John, and John Miller	Jeffrey, W. (Jamieson's Trustee)	47	565
Waldie, George	Roxburgh, Duke of	1	1
Wauchope, James, and Others	Roxburgh, Duke of	7	41
Writers to the Signet	Solicitors S. C. of Scotland	37	348
Writers to the Signet	Graham, John	45	538

INDEX OF MATTERS

TO

VOLUME I.

ACQUIESCENCE.—A landlord having let a mill described as a paper mill; and it having been made use of, with his knowledge, for six years as an oil mill; and thereafter the tenant having assigned the lease to another party, who employed it as a flour mill;—Held, (affirming the judgment of the Court of Session), That the landlord was barred from insisting that it should not be used as a flour mill, but should be reconverted into a paper mill.—No. 46. p. 560.

ADVERTISEMENT.—See *Landlord and Tenant*.

AGENT AND CLIENT.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That an agent in a sequestration was not entitled, after the bankrupts had been discharged on payment of a composition, and finding security for payment of expenses, to claim the amount of his account from the creditors.—No. 23. p. 191.

ALIMENT.—A nobleman having left his estates to his eldest son, and a provision of L. 12,000 to his second son; and the eldest having made an entail, excluding his brother from the estates, but calling his son as institute; and conveyed the estates to trustees, to be held for a number of years, so as to exclude his brother's son from the enjoyment of them during that period; and on his death, his brother's son having made up titles under the entail, subject to the burden of the trust; and the trustees having been infeft; and he having an income by his wife of L. 500 per annum;—Held, (affirming the judgment of the Court of Session), That he had no claim against the trustees for aliment, either under the Act 1491, as representing his grandfather, or on any other ground.—No. 21. p. 183.

—The Court of Session having found, that a son who had a commission in the army as an ensign, with L. 90 of pay, and an allowance of L. 100 a-year from his father, (who was an heir of entail in possession of an estate yielding an income of L. 10,000), was entitled to an aliment of L. 800 per annum from his father;—the House of Lords reversed the judgment, and assoilzied the father.—No. 31. p. 266.

—Held, (affirming the judgment of the Court of Session, with costs), 1. That the younger brother of an Earl, who had attained majority,—had received a provision from his father of L. 12,500,—and who had succeeded to the titles, but was excluded from the estates by a trust-deed executed by his brother in favour

ALIMENT continued.

of trustees,—had no claim of aliment against these trustees, although he was destitute, and the estates had originally belonged to his father: 2. That he was not entitled to payment of the expenses of process out of the trust-estates.—No. 41. p. 402.

ARRESTMENT JURISD. FUND. CAUSA.—See *Foreign*.

ARRESTMENT.—See *Inhibition*.

ASSIGNATION IN SECURITY.—Two parties being joint tenants of certain quarries, and sole partners of a company for working them; and one of them having become the landlord, and advanced a sum of money for the other, who, in security, granted an assignation of his share in the concern; and there being no publication of this deed, or express intimation to the manager of the quarries, till within sixty days of the granter's bankruptcy; and the Court of Session having found, in a question with his creditors, that the assignee had acquired no preference;—The House of Lords remitted to take the opinions of all the Judges.—No. 54. p. 620.

BANK-NOTES.—A person having cut in two the notes of the Bank of Scotland, for more safe transmission, (as he alleged), and one set of the halves having been stolen, and the Court of Session having found that the Bank was not bound to pay on production of the other set of halves, although the value of the stamp, and charges for issuing new notes, were offered, and security against any demand being made for the lost halves;—the House of Lords reversed the judgment, and remitted to allow a proof of an averment, that the notes had been cut maliciously and designedly to injure the Bank.—No. 9. p. 10.

BANKRUPT.—A trustee on a sequestrated estate under the 33. Geo. III. c. 74. having in a scheme of division inserted a claim, but allotted no dividend; and having marked that the claimant 'held goods;' and no complaint having in due time been made by the claimant; and the trustee having paid away all the funds;—Held, (reversing the judgment of the Court of Session), That the trustee was not liable for the dividends.—No. 47. p. 565.

— See *Cessio Bonorum—Agent and Client*.

BONA FIDES.—See *Entail*.

BURGH ROYAL.—See *Personal Objection*.

CAUTIONER.—See *Septennial Prescription*.

CESSIO BONORUM.—Circumstances under which (affirming the judgment of the Court of Session) the benefit of the cessio bonorum was granted to a party, on condition of introducing into the disposition omnium bonorum a clause revoking all deeds granted by him 'which may have had the effect of excluding his jus mariti' over his wife's estate and effects, heritable and moveable.—No. 9. p. 65.

CLAUSE.—See *Fee and Liferent—Implied Revocation—Obligation—Tack—Trust—Writ*.

— Found, (affirming the judgment of the Court of Session), That a clause in a procuratory of resignation, 'that the eldest son, and the descendants of his body, shall always succeed preferably to the younger sons, and their descendants,' did not alter or qualify a destination in the dispositive clause to heirs-male of the marriage; whom failing, heirs-male of any other marriage; whom failing, heirs-female of the marriage; so as to let in a daughter of the eldest son (his issue male failing) in preference to that eldest son's next brother.—No. 38. p. 353.

— Clause held (reversing the judgment of the Court of Ses-

CLAUSE continued.

sion) to import a discharge by a daughter of all the rights competent to her as heir of provision under the postnuptial contract of her father and mother.—No. 52. p. 595.

— See *Heir and Executor—Superior and Vassal.*

COLLEGE OF JUSTICE.—Found, (affirming the judgment of the Court of Session), That it is the privilege, and has been the practice of the Court of Session, to regulate the accommodation necessary for the different bodies composing the College of Justice in the Inner and Outer-Houses; that the Incorporation of Solicitors have no right to demand any specific accommodation beyond what is necessary for attending the daily business of the Court; that such accommodation had been assigned to them equally with other agents; and that an action at the instance of the Incorporation, for further special and general accommodation as a matter of right, and particularly in relation to the conclusion that they had any real and just right and title, with any other class of practitioners, to possess the areas set apart for practitioners and others, is incompetent.—No. 37. p. 348.

COMPENSATION.—A party having brought an action for payment of a legacy, and compensation being pleaded on an illiquid debt;—Held, (reversing the judgment of the Court of Session), That there was not satisfactory evidence of the debt on which the compensation was founded.—No. 20. p. 172.

COMPETITION.—See *Service—Composition Contract.*

COMPOSITION CONTRACT.—Held *ex parte*, (reversing the judgment of the Court of Session), That cautioners and assignees under a composition contract, were preferable to creditors acceding to that contract, on a fund belonging to the bankrupts in the hands of a party who, for their accommodation, had drawn bills on the competing creditors, by whom they had been accepted.—No. 28. p. 227.

CONDITION.—Held, 1. (reversing the judgment of the Court of Session), That a Canal Company, who, in order to make their canal navigable for vessels drawing four and a half feet water, were authorized to levy certain increased dues, were not entitled to do so before the canal was so navigable; and, 2. That they were liable in repetition of the dues exacted prior to the canal being so rendered navigable.—No. 55. p. 636.

CONSOLIDATION.—See *Service.*

CORPORATION.—See *Title to Pursue.*

DAMAGES.—See *Reparation.*

DELICT.—The Court of Session having in general found a party guilty of various charges made against him in a petition and complaint; a remit made *ex parte* to review the judgment, and state in what respects he had been guilty.—No. 49. p. 577.

DISCHARGE.—See *Clause.*

ENTAIL.—An heir of entail in possession having redeemed a wadset, (part of the entailed lands, and wadsetted under powers in the entail), by taking an unconditional discharge and renunciation, containing a procuratory of resignation *ad remanentiam*, which he, as superior, executed in his own hands; and having, on the supposition that he held it in fee-simple, disposed the wadset to a trustee *mortis causa*; and the trustee having drawn the rents of the wadsetted lands for several years without objection, and paid the same to parties having right under the trust, by whom they were

ENTAIL continued.

consumed ;—Held, (affirming the judgment of the Court of Session), 1. That the wadset right was thereby extinguished, and did not remain a separate estate or right in the person of the reverser, which he could convey to his heir-at-law ; and, 2. That both the trustee, and parties to whom the rents were paid, were protected by bona fides from repetition.—No. 7. p. 41.

—A party having entailed an estate to himself ‘ in liferent, ‘ and to Henry, my eldest son now in life, in fee, and the heirs- ‘ male of his body,’ whom failing, a series of substitutes, under prohibitory, irritant, and resolute clauses, by the two latter of which he declared, that ‘ in case the said Henry, or any of the heirs ‘ of taillie,’ shall do so and so, and particularly contract debt, ‘ then, and in every such case, not only shall all and every one of ‘ such acts and deeds be null and void, but also each and every ‘ heir or person contravening shall forfeit ;’ and having reserved a power to alter ; and a few days thereafter executed a trust-deed in favour of Henry and others for payment of debts, so as to relieve the entailed estate, and granted power to them to borrow money, so as to carry on certain mercantile concerns in which he was engaged ;—Held, (affirming the judgment of the Court of Session), 1. That Henry was included under the resolute clause ; and, 2. That the trust-deed did not revoke the prohibition in the entail against contracting debt.—No. 36. p. 323.

—A party, who was entitled to succeed to two estates as heir of entail, but the investiture of one of them preventing him (as was understood) from holding both, having repudiated one of the estates in favour of the next substitute, with a reservation of his own and his descendants’ rights to take the succession of the estate on the failure of this and the next substitute and their descendants, or in the event that the repudiator and his descendants could take the succession consistent with the entail of the other estate ; and the next substitute having obtained decree of declarator that he was the next heir entitled to succeed under the original entail, in consequence of the decree of repudiation ; and having been served heir of taillie and provision in virtue of these proceedings, and expedited a charter and infeftment ; but no contravention, irritancy, or forfeiture, having been declared against the repudiator ;—Found, (affirming, with a variation, the judgment of the Court of Session), 1. That the descendants of the repudiator were not deprived of their rights under the original entail by the deed of repudiation, the decreet of declarator, or retour of the service, it being now competent for them to hold both estates. 2. That under the destination in the charter to the next substitute, and the heirs-male of his body, ‘ quibus des- ‘ cenden. suis hereditibus quibuscunque ex corpore dict. J. H.’ (the common ancestor of the repudiator and next substitute), the descendants of the repudiator were, in legal construction, called prior to the heirs who, in the original entail, were subsequent to the next substitute in whose favour the repudiation was made ; and that, at all events, the descendants of the repudiator were entitled to reduce the titles made up by the next substitute as contrary to the entail,—the right of the substitute and posterior heirs not having been secured by the positive prescription, and that of the descendants of the repudiator to reduce having been saved from the negative prescription, in consequence of the heir in whose favour the repudiation was made having, within the years of prescription, executed a

ENTAIL continued.

disposition, in terms of the original entail, to himself and the heirs of his body, whom failing, to the repudiator nominatim, and his descendants, on which infestment followed. 3. That, in order to defend against a challenge of such disposition, it was not necessary for the descendants of the repudiator to reduce the deed of repudiation, decreet of declarator, service, and charter following thereon in favour of the next substitute; but that, in order to complete his title, it was competent for him to serve heir of tailie and provision under the original entail to such heir-substitute, as the person last infest in the estate. And, 4. That the vicennial prescription of retours could not, in such a case, exclude the descendants of the repudiator.—No. 42. p. 410.

—See *Heir and Executor*.

EXHIBITION.—See *Service*.

EXPENSES.—See *Wreck—Aliment*.

FEE OR LIFERENT.—A lady who was heir of provision to certain estates, having by her contract of marriage, in the event of succeeding to them, disposed them, 'under the reservation of her own and her husband's liferent right and use thereof,' 'to and in favour of the heir-male of this marriage;' and having succeeded to them;—Held, in a question between her and the heir-male of the marriage, (affirming the judgment of the Court of Session), That she was fiar of the estates.—No. 19. p. 161.

FEE OR SPES SUCCESSIONIS.—See *Trust*.

FOREIGN.—An Englishman, residing in England, having died indebted to certain parties in Scotland, arising out of mercantile transactions; and being creditor of persons resident in Scotland, against whom he had raised actions in the Court of Session; and having nominated executors, who administered in England, claimed in sequestration, and sisted themselves as parties to the actions, but did not confirm in Scotland; and the Scottish creditors having obtained from the Judge-Admiral letters of arrestment jurisdictionis fundandæ canas against the executors, and thereupon arrested in the hands of the Scottish debtors to the defunct;—Held, (affirming the judgment of the Court of Session), That the arrestment was inept to the effect of founding a jurisdiction against the executors.—No. 25. p. 199.

FORUM ORIGINIS.—See *Jurisdiction*.

FRAUDULENT BANKRUPTCY.—See *Jurisdiction*.

HEIR AND EXECUTOR.—An heiress of entail in possession having bound herself and the proprietor, at the end of a lease, to pay certain sums to the tenant for meliorations, but not having constituted them against the estate in terms of the 10. Geo. III. c. 51.;—Held, (affirming the judgment of the Court of Session, with certain variations as to illiquid claims), That the executor of the heiress, and not the succeeding heir of entail, was liable.—No. 27. p. 217.

1. A party having executed an entail of an estate in favour of a certain series of heirs, declaring that the heirs should be bound 'to pay and perform all debts payable and prestat-
'able by me or my ancestors, and every other claim and demand
'to which the said lands and others, or any part thereof, are now,
'or may happen by law to be subjected or made liable;' and also, unico contextu, a general disposition of the estates of which he should die possessed in favour of the same heirs, under a declara-

HEIR AND EXECUTOR continued.

tion, that 'the real and personal estate hereby conveyed is and shall be burdened with the payment of all my just and lawful debts;' and the succession to the entailed and unentailed properties having afterwards gone to different parties;—Held, in a question between them, (reversing the judgment of the Court of Session), That the two estates were liable in relief pro rata of a debt constituted by the granter over them both. And, 2. A legacy having been left by the granter of the above deeds, payable by one of the heirs and his representatives, in case of his succeeding to the estates; and he not having succeeded, and his representative having only got a part of the succession, while the other part went to the legatee;—Held, (reversing the judgment of the Court of Session), That the legacy was not exigible.—No. 57. p. 672.

See *Implied Will*.

HUSBAND AND WIFE.—See *Trustee*.

IMPLIED OBLIGATION.—See *Master and Servant*.

IMPLIED REVOCATION.—A husband having purchased landed estates at a judicial sale, and executed a deed of conveyance and settlement, proceeding on the narrative, that 'I am now resolved, in the event of my death before my titles to the said lands and estate are made up and completed, to convey the said purchase to and in favour of my dearly beloved wife,' and assigning and conveying such and such lands to his wife, 'her heirs, assignees, and disponees;' and having thereafter taken from the Crown a charter of sale and resignation of these lands, to 'him, his heirs and assignees;'—Held, (affirming the judgment of the Court of Session), in a question between the wife and the heir of her husband, that the conveyance to his wife was not revoked by the Crown-charter.—No. 8. p. 59.

See *Entail*.

IMPLIED WILL.—Circumstances under which a Scotchman, having sold a part of his landed estate, and invested a portion of the price in the public funds, and intimated to an heritable creditor in London his intention of paying the debt in six months; but having died before the expiration of that period, and consequently before payment;—Found, (affirming the judgment of the Court of Session), That the deceased's residuary legatee was bound to free and relieve the landed estate, and the heir of entail, of that heritable debt.—No. 58. p. 678.

INHIBITION.—The Court of Session having found an inhibition on a supplementary action nimious and oppressive, recalled it, and ordered it to be scored in the record, and marked on the margin as done by their authority;—The House of Lords affirmed the judgment in hoc statu, so far as it recalled the inhibition; but reversed it, so far as it found the inhibition nimious and oppressive, and ordered it to be scored on the record and marked on the margin.—No. 43. p. 531.

—An heir of entail having been found entitled to restitution of part of the entailed estate from purchasers; and they having brought an action against him for ameliorations, on which they executed arrestments and inhibition, and the heir having a counter action, for bygone rents, of a much larger amount;—Held, (reversing the judgment of the Court of Session), That the heir was entitled to have the arrestment and inhibition recalled without caution.—No. 60. p. 709.

INTERDICT.—Circumstances under which (reversing the judgment of

INTERDICT continued.

the Court of Session) a party, who had been interdicted from fishing by stake-nets within certain bounds, was held not to have committed a breach of the interdict.—No. 51. p. 590.

INTEREST.—See *Wreck*.

JUDICIAL REMIT.—Held, (affirming the judgment of the Court of Session), That a party having acquiesced in a judicial remit to a person of skill, was not thereafter entitled to insist on a proof in regard to facts reported upon by that person.—No. 55. p. 696.

JURISDICTION—STAT. 1701, c. 6.—Held, (affirming the judgment of the Court of Session), 1. That under the Act 1696, c. 6. the Court of Session has jurisdiction, exclusive of the Court of Justiciary, as to fraudulent bankruptcy; 2. That although a party was imprisoned on a charge of fraud and fraudulent bankruptcy by a warrant of the Court of Justiciary, yet that letters of intimation under the Act 1701, c. 6. from that Court were unavailing to the effect of getting liberation from imprisonment under a charge of fraudulent bankruptcy; and, 3. Question raised as to whether the Act 1701, c. 6. applied to proceedings before the Court of Session, and the finding of that Court in the negative superseded.—No. 53. p. 608.

—The Court of Session having sustained their jurisdiction against a Scotchman domiciled in England *ratione originis*;—The House of Lords reversed the judgment, and remitted to inquire on what other grounds appearing on the pleadings jurisdiction could be sustained, and having regard to a suit depending in Chancery when the summons in Scotland was raised.—No. 61. p. 716.

—See *Foreign*.

KIRK-YARD.—A party, who had for more than forty years made use of part of the interior of an abbey belonging to the Crown, as a family burial-place, in virtue of a disposition a *non domino*, but which was not followed by *sasine*;—Held, (affirming the judgment of the Court of Session), That he was not entitled to a prescriptive right, or to prevent the Officers of State from taking possession of the ground, removing a wall, and clearing away rubbish,—they consenting to inter on the spot the remains of the dead found there.—No. 44. p. 533.

LANDLORD AND TENANT.—A landlord of several mills on a stream of water having advertised them for lease, and represented that they had an abundant and regular supply of water; and a party having taken one of the inferior mills, without any special stipulation as to the water; and the landlord having let the upper mill, under the condition, that the tenant of it should keep his sluices open at least three hours in the day;—Held, (affirming the judgment of the Court of Session), That the tenant of the lower mill was not entitled to withhold payment of his rent, or to claim damages from the landlord, on the ground of having, by the above condition, been deprived of a sufficient supply of water; reserving his claim of damages against the tenant of the upper mill, if he any had.—No. 18. p. 153.

LEASE.—See *Assignment in Security*.

LEGACY.—See *Compensation—Heir and Executor*.

LIEN.—Held, (affirming the judgment of the Court of Session), That a person employed to cut wood under the superintendence of the manager of the employer, and who was not in actual possession of the wood, had no right of lien or retention for payment of his wages. No. 40. p. 399.

LOAN.—See *Oath*.

MASTER AND SERVANT.—Circumstances under which (affirming the judgment of the Court of Session) a master, against whom an interdict had been granted, was held not answerable for a breach of it committed by his servant.—No. 1. p. 1.

OATH.—Under a reference to the oath of party, whether a certain sum of money had been advanced in loan, found, (affirming the judgment of the Court of Session), That the oath did not prove that the money had been advanced in loan, and therefore the defender was entitled to absolvitor.—No. 6. p. 35.

OATH OF CALUMNY.—A party having raised an action on a bond granted to his father in 1782, for the principal sum and interest from that date; and the defenders having alleged that the whole interest had been paid, but being unable to produce stamped receipts for it prior to 1818; and having required the party to emit an oath of calumny, and he having declined to depone that he believed the interest was due, but having sworn merely that money to the extent sued for was due; and the defenders having paid the principal sum;—Held, (affirming the judgment of the Court of Session), 1. That they were entitled to be assoilzied; and, 2. Question raised, but not decided, as to the effect to be given to unstamped receipts.—No. 26. p. 208.

OBLIGATION.—A lady, after the death of her husband, having voluntarily offered to assign, for behoof of his creditors, the surplus rents of her estate, after allotting a certain part of them to her own use; and having calculated that thereby, and with other means, the debts would be paid in five years; and having granted an obligation and assignation, conveying her rents to commissioners for that purpose, but without restricting the period to five years;—Held, (reversing the judgment of the Court of Session), That the creditors were entitled to the surplus rents till their debts were paid.—No. 14. p. 112.

—See *Bank-notes*.

PACTUM ILLICITUM.—Certain parties having agreed to defray the expenses of a prosecution at the instance of a procurator-fiscal, and taken active measures in support of it; and having alleged, that in the course of the proceedings they had disclaimed them; and the procurator-fiscal having been subjected in expenses and damages on account of the prosecution; and the Court of Session having found him entitled to relief;—The House of Lords so far affirmed the judgment as found him entitled to relief, but remitted to hear farther as to the amount of the expenses and damages, and as to the liability of the parties subsequent to the date of the alleged disclaimer.—No. 29. p. 232.

PERSONAL OBJECTION.—Circumstances under which it was held, (reversing the judgment of the Court of Session), That a party making use of a right which he only had under documents challenged by him, to the effect of having them reduced, was barred from insisting that they should be set aside.—No. 48. p. 570.

—Circumstances under which (affirming the judgment of the Court of Session) a party was held barred from reducing certain deeds made in contravention of an entail.—No. 13. p. 103.

PRESCRIPTION.—A fee-simple proprietor having, in 1732, executed an entail of his estate to his son, and the heirs of the son's marriage, and other substitutes, reserving power, with consent of his son, to

PRESCRIPTION continued.

alter, except as to the heirs of the marriage, on which infestment was not taken; and having, in 1741, with his son's consent, executed a disposition of the estate, without fetters, on which sasine was taken; and having cancelled the entail; and one of the heirs of the marriage having afterwards, by a decree of proving the tenor, revived the entail, on which infestment was taken in 1768; and the heirs of the marriage having become extinct in 1797; and a party who was entitled to succeed, both under the entail and the unfettered disposition, having in ignorance of the latter made up titles under the entail, and there having been a possession for a period exceeding forty years from the date of the infestment in 1768;—Held, (affirming the judgment of the Court of Session), That, having two titles, he was entitled to impute his possession to the unfettered disposition, and that the entail was not rendered effectual against the estate by prescription.—No. 33. p. 306.

—————Question raised, but remitted for reconsideration, Whether a party had a sufficient title and possession to acquire a prescriptive right to coal?—No. 56. p. 657.

—————See *Kirk-Yard—Entail*.

PRISONER.—See *Cassio*.

PROCESS.—Incompetent for the Court below to amend an interlocuter after an appeal entered.—P. 215. Note.

—————Found, (affirming the judgment of the Court of Session), That the Court of Session have, on good cause shewn, power to recall letters of advocacy after they have been signetted.—No. 35. p. 318.

—————A party who had an opportunity of being heard at the Bar of the House of Lords on points incidentally noticed in his printed case, and on which judgment was given, although he alleged he was not heard, is not entitled to a re-hearing.—No. 30. p. 239.

—————See *Teinds—Clause*.

PROOF.—See *Legacy*.

PROPERTY.—See *Salmon Fishing*.

RE-HEARING.—See *Process*.

RELIEF.—See *Pactum Illicitum—Heir and Executor—Implied Will*.

REPARATION.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a party was not entitled to damages for the alleged illegal execution of diligence.—No. 15. p. 131.

—————See *Master and Servant—Wreck*.

REPETITION.—See *Condition*.

RES NOVITER.—Found, (affirming the judgment of the Court of Session), That deeds on public record cannot be regarded as instruments noviter reperta, so as to entitle a party to found on them under the rule *res noviter veniens*, &c.—No. 38. p. 353.

RETENTION.—See *Lien*.

RIVER.—See *Landlord and Tenant*.

SALE.—Circumstances under which it was held, (affirming the judgment of the Court of Session), That statements made by the agent of a seller to a purchaser, relative to the shipping of certain bags of cotton wool at Liverpool to Glasgow, did not amount to such a misrepresentation as to liberate the purchaser.—No. 2. p. 4.

SALMON FISHING.—A party holding a right of salmon fishing found, in a question with an adjacent heritor, (affirming the judgment of

SALMON FISHING continued.

the Court of Session), to have no right to erect sights and towing-paths on the alveus of the stream: But the House of Lords remitted to the Court of Session to inquire, whether a bulwark or embankment, built by the adjacent heritor against the stream, was so constructed as to be injurious to the right of fishing in the water, and in a manner not necessary to its utility as a bulwark or embankment.—No. 50. p. 583.

—See *Interdict*.

SEPTENNIAL PRESCRIPTION—STAT. 1695, c. 5.—A creditor holding a bond from two individuals, both bound as principal co-obligants, although one was known to be merely cautioner, having accepted a composition, and discharged the principal, reserving recourse against the cautioner; and more than seven years having elapsed from its date;—Held, (affirming the judgment of the Court of Session), 1. That the Act 1695 did not apply; and, 2. That, as the reservation was of a qualified and conditional nature, (viz. that the discharge should not be effectual to the principal in case the cautioner should thereby be liberated), the cautioner was liable for the balance.—No. 34. p. 315.

SEQUESTRATION.—See *Agent and Client—Bankrupt*.

SERVICE.—Thomas having in 1748 executed a deed of settlement of his estates, and of those to be acquired by him, containing a simple destination, and procuratory of resignation in favour of his brother David, and the heirs of his body; whom failing, certain other substitutes; whom failing, his own nearest heirs whatsoever; and the superiority of part of the lands being separated from the property; and having, after making up titles to the superiority, and, in order to consolidate it with the property, given a commission to a third party, who granted to him a charter of confirmation of the base right, and a precept of clare constat for the specific purpose of consolidation, on which he was infeft; and having thereafter purchased certain parcels of lands, on which he was infeft; and for political purposes granted a procuratory of resignation for new infeftment of the greater part of the lands included in the deed 1748, to himself, his heirs and assignees, in fee, on which he expedite a charter in 1774, but did not take infeftment; and having died without issue, and been succeeded by David, who obtained a general service to him ‘*tanquam legitimus et propinquior hæres masculus et linæ*,’ and been infeft on the precept in the charter of 1774; and David having thereafter executed an entail in favour of a series of heirs, exclusive of the heirs whatsoever of Thomas, and died without issue; and the intermediate substitutes under the deed 1748 having failed, and the heir whatsoever of Thomas having brought an action of exhibition against the heir succeeding in virtue of the entail, and a reduction of the titles made up by David, and of the entail;—Held, (affirming the judgment of the Court of Session), 1. That the service of David to Thomas was effectual to convey to David the personal right of all the subjects specified in the settlement 1748, and contained in the charter 1774, and entitled him to execute the entail, but not as to lands not included in the charter of 1774: 2. That the terms ‘heirs and assignees’ under the charter of 1774 did not necessarily imply the same heirs as those called by the deed of 1748: 3. That (without deciding the point of consolidation) as Thomas was vested in the personal right both of the superiority and property, that right

SERVICE continued.

was transmitted to David by his service: But, 4. A remit made to consider, whether the right to the lands which had been acquired by Thomas subsequent to the deed 1748, and not contained in the charter 1774, could be transmitted to David by the above service: and, 5. That the entail was sufficient to exclude the heir of Thomas from insisting in an exhibition of the previous titles.—No. 90. p. 239.

—The proprietor of certain lands having disposed them to a trustee for purposes expressed in a relative deed of instructions; and his two heirs-portioners, A and B, having, on his death, granted a trust-bond, on which an adjudication was led, and which was thereafter assigned to these heirs; and they having got a decree, reducing the deed of instructions, and ordaining the trustee to convey to them; and he having disposed to them, with procuratory and precept, on the latter of which they were infeft; and one of them, A, having died, and the other, B, having obtained a general service as heir of A, and exped a charter of resignation and confirmation on the procuratory, and been infeft; and B having died, after executing a deed of settlement in favour of trustees, conveying all her rights, and binding herself and her heir to give them an effectual title; and her trustees having thereupon obtained a charter of adjudication, and been infeft; and the heirs-portioners of line, both of A and B, having exped a special service to B, and obtained themselves infeft in the superiority of the whole subjects; and thereupon granted to themselves a precept of clare constat as heirs of A, and been infeft;—Held, in a competition, (amending the judgment of the Court of Session), 1. That the general service and charter of resignation could only vest in B the superiority of her own and A's share of the lands; and therefore, as A remained vested in the fee of the dominium utile of her share, her heirs were preferable to the trustees of B; and, 2. That although B's general service conveyed to her A's personal right to the adjudication, yet as B had not made up titles to A's share of the lands, the charter of adjudication exped by B's trustees could not exclude the heir of A.—No. 39. p. 381.

—OF HEIRS.—See *Entail*.

STAMP.—See *Oath of Calumny*, and Note, p. 211.

STATUTE 1681, c. 5.—See *Writ*.

SUBMISSION.—A landlord having obtained and extracted a decree of irritancy of his tenant's lease, in which there was no stipulation as to meliorations; and thereafter entered into a submission with him of 'all claims, questions, disputes, and differences of every kind depending and subsisting betwixt them, upon any account, transaction, or occasion whatever, preceding the date hereof;' and the arbiter having found the tenant entitled to a sum for meliorations;—Held, (affirming the judgment of the Court of Session), That he had not exceeded his powers.—No. 24. p. 194.

—Circumstances under which (affirming the judgment of the Court of Session) a decree-arbital, alleged to be ultra vires, and to contain an error calculi, was sustained.—No. 17. p. 143.

SUPERIOR AND VASSAL.—The Court of Session having found, that a clause in a feu-contract, allowing subdivisions of the feu to be held of the superior, but declaring that all dispositions, conveyances, and infeftments, of the whole or any part of the lands, shall be

SUPERIOR AND VASSAL continued.

made out by the superior's agent, otherwise the same shall be null and void, was available to the superior to entitle him to reduce any deed or conveyance not prepared by his agent, in terms of the original feu-contract;—the House of Lords remitted the case for review, and the opinion of all the Judges.—No. 59. p. 690.

TACK.—In a lease of an arable farm, situated near a small town, the landlord having reserved right to feu the whole or any parts or portion thereof, allowing recompense in proportion to the rent payable for the whole; and having feued part of the farm, by a feu-disposition, for a principal sum, with a reddendo of one shilling; and an action of removing having been brought against the tenant; and the Lord Ordinary having decerned in the removing; but the Court having ordered a condescendence as to the practice of feuing lands on the estate, and thereafter assoilzied the tenant;—The House of Lords reversed the judgments of the Court ordering the condescendence and assoilzieing the tenant, and affirmed that of the Lord Ordinary decerning in the removing.—No. 10. p. 68.

TEINDS.—Found, (affirming the judgment of the Court of Session), 1. That a decree of approbation of a sub-valuation, pronounced in absence of the minister of the parish, may be competently challenged by reduction: 2. That the feudal proprietor is the proper pursuer of an action of approbation: And, 3. That the minister who has been presented to the parish, and his presentation sustained, but who has not been inducted at the date of citation, and not the moderator of the Presbytery, is the proper defender.—No. 32. p. 295.

TESTING CLAUSE.—See *Writ*.

TITLE TO PURSUE.—An action having been brought by the keeper and depute-keeper of the signet, and of the commissioners, treasurer, and procurator-fiscal of the corporation or society of clerks or writers to the signet, (but not setting forth that they pursued on behalf of the society), against a member of the body, to have it found that certain rules were legal and proper; that effect should be given to certain proceedings by them against that member for alleged infraction of the rules; and that they had power to suspend him from or deprive him of his office; and the Court of Session having sustained the title of the pursuers to sue, and decerned in terms of the libel;—The House of Lords reversed, and assoilzied the defender.—No. 45. p. 538.

TEINDS.

TRUST.—A party having conveyed to trustees his whole funds, interest and proceeds thereof, to be vested in lands which were to be annexed to his entailed estate, and bequeathed legacies, of which one was not payable for six months after his death; and his heir of tailie having claimed the interest of the funds from and after the day on which the truster died;—Held, (affirming the judgment of the Court of Session), That he was not entitled to interest from that period.—No. 11. p. 72.

—A mother, who was vested in the fee of certain subjects, having conveyed them to trustees for the purpose, inter alia, of paying a specific sum of debt, an annuity to herself, and conveying the free residue to her children nominatim, on which infestment followed; and having thereafter executed a supplementary trust-deed,

TRUST continued.

authorizing the trustees to dispose of the subjects for a larger debt than that specified in the first deed;—Held, (reversing the judgment of the Court of Session, and affirming that of the Lord Ordinary), That she was not entitled to execute the second deed, and that her children were entitled to have it reduced.—No. 12. p. 80.

TRUSTEE.—A husband and wife, along with other parties, having been named trustees under a deed of settlement;—Held, (affirming the judgment of the Court of Session), That the wife was entitled to act and vote as a trustee.—No. 22. p. 188.

WADSET.—See *Entail*.

WRECK.—Circumstances under which (affirming the judgment of the Court of Session) a party dispossessing a salvor was found liable in damages and reparation to the owner of the vessel, and interest allowed on the expense of extracting the Judge-Admiral's decree.—No. 5. p. 22.

WRIT.—Held, (affirming the judgment of the Court of Session), That a testing clause, naming and designing certain persons who signed as witnesses, but not expressly stating that they were witnesses to the subscription of the granter, was effectual.—No. 16. p. 140.

WRITERS TO THE SIGNET.—See *Title to Pursue*.

WRONGOUS IMPRISONMENT.—See *Jurisdiction*.



APPENDIX. I.

No. I.

NOTES OF THE OPINIONS OF THE JUDGES OF THE COURT OF SESSION, AT THE FIRST ADVISING OF THE PETITION FOR MRS FULLARTON AGAINST LORD JUSTICE CLERK'S INTERLOCUTORS, WITH ANSWERS FOR MR HAMILTON OF BARGANY.

January 13, 1796.

LORD ESKGROVE.—I wish to be informed by my Lord Justice Clerk of the Meaning of the Reservation in his interlocutor. It is not fixed by the *first finding* of the interlocutor, that supposing Mr Hamilton did incur an irritancy by expeding the charter 1742, that is now cut off by the positive prescription? The reservation annexed appears to me to be an inconsistency.

LORD JUSTICE-CLERK.—The interlocutor, no doubt, finds, that, so far as the investiture 1742 innovates or alters the terms of the original entail 1688, the latter is now at an end, and the estate is secured by the present investiture: But it is alleged by the pursuer, that the charter 1742 is agreeable in its terms to the entail 1688, and therefore subsequent irritancies since the date of the last investiture, in contravention of the limitations in that investiture, and of course of those likewise in the old entail, may have been incurred and may still be declared: It is to such that the reservation is meant to apply.

LORD PRESIDENT.—I entirely approve, and would adopt the explanation which has been given; but to prevent ambiguity, I would, after the clause "*whether or not the defender has incurred any irritancy under that entail,*" insert the words '*as ingrossed in the charter and sasine 1742.*'

I am clearly of the opinion delivered in this interlocutor: Mr Hamilton cannot now be disturbed in his right to this estate. He has possessed upon a regular investiture for upwards of *forty* years without interruption. This affords him a complete exclusive prescriptive title, and no challenge of his right under that investiture can now be listened to. If, however, he has committed subsequent deeds of contravention against the prohibitory clauses of the entail contained in his own charter 1742, these may still be challenged in a declarator of irritancy: The discussion of these will remain entire to the parties; they make no part of the present question, which

is only, Whether the defender has produced a title sufficient to exclude? This, I am of opinion, does not admit of a doubt, unless minorities are to be deducted; and that is a point now finally at rest, and which will not again be disputed. All questions relative to irritancies, or to the succession of the estate, must henceforth be regulated by the deed 1742.

LORD ESKGROVE.—I entirely approve of the Lord Ordinary's interlocutor. The charter produced, as an exclusive title, bears no *ex facie* objection of nullity; it is therefore very clear, that *Mr Hamilton* must continue to hold the estate against all mankind, whether heirs or others. It makes no difference upon the question, whether he pleads an exclusive right upon a deed of his own, or upon that of another conveying the estate to him. This charter also affords a good prescriptive title to all the heirs, who are therein called to the succession. It is only to be enquired whether the course of prescription has been stopped by legal interruptions, or suspended by minorities; for minorities only suspend, but do not properly interrupt prescription. Now, upon general principles, it were, I think, to be wished, that minority did not, in any case, interrupt the *positive prescription*; but the decisions upon this point all bend the other way, and by them it has now become our duty to abide. Here, however, the case is different, and regards only heirs of entail. The decision in the case of *Kinaldy* proceeded upon this distinction: There the challenger had been all along major, and the House of Lords found that he was not entitled to deduct the minorities of prior heirs from the period of prescription. In the present case, as will usually happen, some substitute of full age must always have existed since 1742, who might have brought a challenge of the contravention against the entail.

LORD SWINTON.—I also am for adhering to this interlocutor. To allow the deduction of minority in this case, would be at once to put an end to the act 1617.

MR SOLICITOR-GENERAL (Counsel for *Mrs Fullarton*).—If the pursuer shall be permitted to establish the declaratory conclusions of her libel, she will be able to shew that she was entitled to enter into immediate possession of the estate as next heir to *Mr Hamilton*, who had irritated, and lost all right to it by its contraventions. In that respect, her situation is very different, and vastly more favourable than that of the claimants in the case of *Whiteley*, and the other cases which have been quoted as precedents on the other side.

LORD PRESIDENT.—The case of *Whiteley* was decided upon general principles. By that decision it is established, that the minority of an heir of entail cannot, in any case, suspend the course of prescription; whether it be that of nearer, or of a more remote heir.

NOTES OF THE OPINIONS, ON ADVISING PETITION FOR
MRS FULLARTON, AND ANSWERS FOR MR HAMILTON, FOL-
LOWED BY A HEARING OF COUNSEL.

February 9, 1796.

LORD ANKERVILLE—(was not heard.)—Of opinion that the pursuer's minority ought to be deducted.

LORD JUSTICE-CLERK.—The sole point to be determined at present is, whether the years of *Mrs Fullarton's* minority are to be deducted from the period of prescription. In ordinary cases of the positive prescription, the question as to deduction of minorities may be considered as now at rest. It has been decided, both here and in the House of Lords, that the exception in the act 1617, applies equally to the positive and negative prescriptions. At the same time, this statute is to be considered as one of the most valuable laws that exists in this or in any other country. The prescription it establishes is very different from the *usucapio* of the Roman law; for the period is so long that, without the grossest negligence, none can be hurt by it. Besides, in the case of an entail, such as the present, every substitute heir, however remote, is entitled to pursue an action of declarator; and the question comes thus to be, Whether a joint interest exists in a number of individuals, united in a sort of aggregate or corporate body, many of whom are always *major*, shall the minority of any one suspend the course of prescription? In some minute circumstances this case may be different from those of *Whiteley* or *Auchindachy*, but the principles upon which these cases were decided, extend to, and regulate this also. The principle of these decisions was, that it is not the minority of a person having a *contingent interest*, but that of the *verus dominus* only, which can be deducted from the positive prescription. On this ground, *Mrs Fullarton's* plea must be rejected. Her Counsel, indeed, have been at great pains to make out a distinction in her rights and interest under the entail, from those of the other substitutes; but, notwithstanding all that has been said, it is still true, that her right to this estate is merely contingent, and not essentially different from that of any other heir of entail, although the effects of a declarator of irritancy might prove more immediately beneficial to her. As she is not *vera domina*, she is not entitled to plead minority. Unless this rule was adopted, prescription could never run against an entail. Various cases have been put by *Mrs Fullarton's* Counsel to illustrate his argument, such as that of a challenge upon the head of death-bed, and that of a personal right to an estate, against which prescription does not run during the minority of the person entitled to pursue. These cases, however, are *toto cælo* different from the present. In the first, one person alone, the apparent heir, is entitled to challenge *ex capite lecti*; and, accordingly, so exclusive is his right, that even without making up titles, he may discharge the action, and thereby bar the challenge of any subsequent heir. In like manner, in the case of a personal right to an estate of which another is in possession, it is only the apparent heir who can institute a chal-

lenge. Thus, both cases are in this respect materially different from the present. In both, the competitor may be feudally vested in the estate, yet the persons entitled to pursue, are not, on that account, the less to be considered as *veri domini*; and, accordingly, a dispo-see from them would take up the estate on the event of a reduction; whereas, on the other hand, the deeds of the competitor would fall, of course, along with his own right. *Mrs Fullarton* may certainly have a stronger or more immediate interest than the subsequent heirs, but still her right is merely contingent. A declarator is absolutely necessary to its constitution, and without it she cannot serve. Let us suppose in the case of an entail, which extends its irritancies to the descendants of the contravener, that the heir in possession has disposed to the next heir in prejudice of the heirs of his own body, a contravention has undoubtedly been committed, yet the children are entitled to plead, that they cannot be injured by an irritancy which was not declared against their father while he lived, and which cannot be declared against him after his death. Upon the same principles, securities granted upon an entailed estate, unless inconsistent with the restrictions of the entail, are valid in spite of previous irritancies, if these irritancies have not been previously declared. Thus it is, that declarator is necessary to resolve the right of a contravener, and establish that of the next substitute: And thus it is that *Mrs Fullarton's* right is merely contingent, and very different from that of an apparent heir. Her minority ought, therefore, not to be deducted.

LORD ESKGROVE.—Resting upon the authority of former decisions, I was first of opinion that the present question was to be given against the pursuer. And, indeed, if these decisions are to be regarded as precedents, there is an end to this dispute, and we must yield to them as established law. But as a hearing in presence has been allowed for discussing the point, I am led to presume that it is considered by the Court as still open; and therefore, taking it up upon abstract and general principles, I am now inclined to be of a different opinion, and to hold that minority must in general be deducted from the positive, as well as from the negative prescription. I have considered all the cases which have been decided, downwards, to that of *Hamilton Blair*, and can find nothing done by this Court to shake its authority as a precedent. In this respect, the enactments of the statute 1617 have been followed out, though, perhaps, considering the matter in point of expediency, it might have been more beneficial for land-rights, if the statute had, in no instance, allowed the deduction of minority from the positive prescription. As there is no record of minorities, interruptions cannot easily be discovered; hence the security of purchasers is very sensibly affected, and a progress of titles, which does not extend very considerably beyond the prescriptive period of forty years, will scarcely be received as sufficient. But nothing less than an act of the legislature could, in this respect, cut out the rights of minors. And independent altogether of the authority of the exception in the act 1617, I am of opinion that upon general principles of equity, as well as on the principles of the civil and our own common law, the period of minority ought to be deducted.

Setting aside the authority of decisions, and applying the general

rules of law to this case, another point must be taken for granted, namely, that the facts alleged by the pursuer are true:—1st, That, during her minority, Mr *Hamilton* had incurred an irritancy by which he would have forfeited his right to the next heir. 2^d, That this pursuer is herself next heir of entail, in whose favour Mr *Hamilton's* right would have been resolved. If she was only a remote heir, and if Sir *Hew Dalrymple's* family shall afterwards shew that they are nearer substitutes; then, upon the principles of the case of *Kinaldy*, the deduction of her minority must be refused; but, presuming, *in hoc statu*, that she was then the next heir, and that there is yet no authoritative decision on this precise point, I conceive that Mrs *Fullarton* is entitled to avail herself of her minority. [Quotes the words of the act 1617, relative to the exception of minorities.] The words of the act contain a general description of the effect of minority. In all such cases there must necessarily be two parties, one in whose favour prescription is running, another who is losing by it, and against whom, in the words of the act, it is *used and objected*. In the case which most frequently occurs, of a right to an estate in fee-simple, acquired *a non domino*, there must always exist some person entitled to challenge, of whose minority the statute allows deduction. The circumstances of an entail do not seem materially to alter the case, for the next heir who is in the right of claiming the estate in consequence of an irritancy, is equally the person against whom, in terms of the statute, prescription is used and objected. The minority of the heir of entail ought therefore, like that of any other true proprietor, to be deducted.

It is admitted, that in the case of death-bed deeds, and of personal rights to an estate, that minority must be deducted; but, at the same time it is pretended, that, in these cases, the person having a right to challenge is *verus dominus* of the estate; of this distinction, however, I cannot perceive the force. In some respects, and particularly in a feudal sense, it is not true that the challenger in these cases is *verus dominus*. The disponee under a death-bed is so much *verus dominus* in the eye of the law, that, until the deed under which he holds is reduced, he may alienate or burden the estate. It is a novelty to apply the term *verus dominus* to a person who is neither in possession, nor *in titulo*, and who, equally with an heir of entail, must bring an action for completing his right, and turning the usurper out of possession. Compared with these cases, I can see no justice in refusing the benefit of minority to an heir of entail, who is entitled to declare an irritancy against the possessor, and to assume the property. It is a thin distinction to say, that because he must bring a declarator similar to that competent to all the other heirs of entail, and because the minorities of all cannot be deducted, that therefore the minority of none can be admitted. This is contrary, in my opinion, to justice and reason. I can discover a good reason for disregarding the minorities of more remote heirs, and for not allowing majors to avail themselves of the minority of other heirs, as was decided in the case of *Kinaldy*; but it does not thence follow, that we are to consider the substitutes of an entail as forming a body corporate, like the trades of a burgh, and that minority should in no case be deducted, from prescription against an entail. The case of *Macker-*

ston is the only one which comes near the present, for there too there were irritant and resolute clauses; these, however, do not appear to have been founded on; and, indeed, the circumstances of the case have not been sufficiently cleared up. In arguing the case of *Kinaldy*, that of *Mackerston* came under review; and I find a paper drawn by a very able lawyer in the cause, who was afterwards a most respectable Judge (Lord Coalston.) The principle of that decision is said to have been, that minority could in no case interrupt prescription against entails. [Quotes the words of Lord Coalston's paper.] I agree with what is here stated in point of fact; but, as I can see no law or reason for that decision, I must be of opinion that minorities suspend the course of prescription.

But it is said, that the rights of nearer and more remote heirs are all the same; that all of them are equally *contingent*, that is, liable in certain events to be defeated. Thus the contravener may happen to die before the declarator, or the irritancy may be purged. This contingency is a new doctrine, not known in the cases of *Mackerston* or *Kinaldy*. The argument comes to this, that, because a man's right may by certain accidents be defeated, he shall not be permitted to avail himself of the ordinary privileges of the law. I am of opinion, that such possibilities of defeat ought not to deprive heirs of their legal privileges. In the case of *Kinaldy*, President Dundas said, that an heir against whom prescription is objected, may in every case plead his own minority, though he cannot avail himself of that of another.

Much stress has been laid upon the circumstance of a declarator being necessary to bring the pursuer into possession. This, however, ought to make no distinction; and I am at a loss to discover the difference, in this respect, between the case of an heir of entail pursuing declarator of his right, and that of an apparent heir cut out by a death-bed deed, who is pursuing a reduction. Both are equally in *petitorio*, and to both an action is equally necessary to complete their rights and procure possession. In a technical sense, neither of them can be called *versus dominus*; and between the two operations necessary to complete that character there is no visible difference.

It is said there is no distinction between the rights and interests of the first, and of more remote heirs. Can it be seriously pretended, that Mrs Fullarton's situation is the same with that of the second, third, tenth, or most remote substitute. All of them, it is true, may bring an action of declarator, but she alone can claim immediate possession of the estate. The remoter heirs can only conclude to have the estate adjudged to the first heir. Against that heir, surely, in an eminent degree, is the prescription used and objected, and to him does the privilege of minority most justly belong. Nothing short of an act of Parliament can deprive him of this right; and when such an act is made, we shall be bound to respect it. In the mean time, though no friend to entails, I think they ought to have fair play, and the heirs of entail should not be deprived of the protection of this law. By refusing deduction of their minorities, very great hardships may often be suffered. Thus, let us suppose, as in the case of *Mackerston*, that a father, heir under an entail, takes up the estate in fee simple, and disposes of it in favour of a younger

son, perhaps by a second marriage, to the prejudice of the eldest son, the heir of entail, and a question of prescription and minority afterwards arises, would it be fair, or not rather most absurd and unjust, to contend, that because the eldest son was only an heir of entail, and had only a contingent right previous to declarator, his minority should not afford him a defence against the prescription? Here would be a son, the heir of an ancient family, defrauded of his estate, while under the power of his father, who was defrauding him. In the present case, this lady, since her father's death, has been in the right of claiming possession of the estate. It was a right *de presenti*, and not contingent, or that could have been defeated. To pretend the contrary, is, in fact, to charge your Lordships with injustice. This, however, was not the state of the fact in any of the late cases which have been quoted. In the case of *Auchindachy* there was no irritant clause, by virtue of which the lady would have taken the right from her brother. In the case of *Whiteley*, which is supposed most closely to resemble the present, the entail contained neither irritant nor resolute clauses, by which the minor could have got into possession, and therefore it does not here apply. Indeed, in that case, I am surprised how minority came at all under consideration, as the estate had been possessed in fee-simple by the father downwards from 1724, and the son was certainly entitled to avail himself of his father's possession as well as of his own, which continued down to 1783.

I am for altering the interlocutor, reserving to the defender to shew that there was a nearer heir, not in *spe*, but in existence, who would have been entitled to claim possession of the estate.

LORD DUNSINNAN.—The privilege of minority is granted for the protection of those who are incapable of doing justice to themselves; and as heirs of entail lie under the same natural incapacities, is there any reason in justice, for not allowing them the same privilege? There is a strong reason why it should not be extended to all the substitutes, who may often be numerous; for thus a large proportion of the property of the country would be withdrawn from prescription. But can the rule therefore apply to none of them? Is there no distinction among them? I think there is an evident and very strong one. I cannot consider the next heir to the contravener as in the same situation with the remoter substitutes. All of them may indeed bring an action, but not with the same effect. I was satisfied by Mr Solicitor's pleading, that the pursuer's interest is not merely casual and contingent, but substantial and immediate. A person under age is not to lose by the neglect of guardians. I am therefore for altering the interlocutor.

LORD GLENLEE.—I at first thought that this case was decided by that of *Whiteley*; but, from what has since been pleaded, a shade of difference has been made out between them; yet I am still of opinion, that the solid reason on which the decisions in the cases of *Mackerron* and *Whiteley* were founded, as well as the true genuine principles of our law relative to prescription, all go to support the interlocutor. The law ought, no doubt, to protect minors from all damage which naturally befalls persons in their situation; but, on the other hand minority ought not to be turned to their advantage, or

permitted to keep the rights and interests of others in suspense and embarrassment. When prescription is opposed by the plea of minority, it must be considered whether the loss was a consequence of minority, and was necessarily inherent in that situation. Founded very much upon this consideration is the principle, that those years only are to be deducted during which the right was in the person of the minor. While the right was not in him, he could neither be better nor worse for his minority. In like manner, when the right against which prescription has been running has existed in a numeric collective body, and might have been founded on by all of them equally, prescription is not suspended by minorities; for minority is not probably the cause that prescription has been allowed to run. All of them, whether nearer or more remote, are equally barred from pleading minority. The positive and negative prescriptions are founded upon quite different principles. The positive is a *præsumptio juris et de jure* of a good right in the possessor. And the only good reason for deducting minority is, that, when only one person exists who has a title to challenge the usurper's right, and that person is a minor, the presumption in favour of possession is thereby weakened. But when there exists a body of heirs, each of whom has the same title to challenge, and yet none of them take this step, there is no reason for diminishing or overturning the force of the presumption, that the possessor's right was unchallengeable. I am little affected by the circumstance of the nearest heir having a stronger or more immediate interest than the more remote. As to the right of pursuing a declarator, they are all *in pari casu*; all of them may equally enforce observance of the entail. The circumstance of afterwards getting possession is merely a consequence of vacating the fee, but adds nothing to the right of making it vacant. Until it becomes actually vacant by a decree of declarator, the right of the next heir is neither better nor worse than that of the most remote. The former indeed having a greater interest, it may be supposed that the rest will be more apt to neglect; but this is not in fact the case. Remoter heirs of entail may often very materially improve their chance of succession, by bringing a declarator of irritancy; which, in many cases, may have the effect of cutting off a whole line of nearer heirs. We often see applications made by remoter heirs, for having entails recorded; and if they rarely pursue declarators of irritancy, it is because contraventions are rare. When contraventions are committed, it may safely be presumed that some of them will not fail to interrupt the course of prescription. The case must always be very different from that where the sole right of challenge is vested in a minor; and, therefore, I am for adhering to Lord Justice Clerk's interlocutor.

LORD CRAIG.—When I read the petition and answers, I was of opinion that the interlocutor was right; but after hearing the Counsel for the pursuer, I had some doubts. I still entertain doubts, and deliver my opinion with great diffidence. I agree in general to the opinions which have been so well explained by Lord *Esqgrove*. The argument for the defenders rests upon this, that a number of persons in the same situation, and having the same rights, are to be considered as a collective or corporate body, none of whom can claim deduction of minority. I admit the principle to be solid, but

I doubt of its application to the present case; for all the substitutes under an entail are not *in pari casu*. The effects of success in a declarator are very different to the next and to remoter heirs. The right of the next substitute, I think, is immediate, not contingent or eventual. The case of heirs portioners, which has been mentioned, is not parallel, as there the deed of any one puts them all equally into immediate possession. It was said that there would be no prescription at all if the minorities of heirs of entail are to be deducted; but the argument is at an end when the privilege is only allowed to the first heir. As to the decisions, though they do favour the general opinion that minorities are not to be deducted, yet they are not exactly similar in their circumstances to the present case.

LORD SWINTON.—We have heard much of contingent rights. I am not fond of contingent decisions. If the defender shall shew that Mrs Fullarton has suffered no hurt from her minority, what good can we do by settling this point? I am for altering the interlocutor. There are two extremes which I would equally avoid, the one that prescription should be deprived of its effect by the operation of minorities, the other that minorities should have no effect. I am for following a middle course, and for restricting the privilege to the nearest substitute. If every substitute may plead his minority, then there would be no prescription in the case of entails; but if you do not allow it to the next heir, then there is an end to the plea of minority. The words of the statute are express. [Reads the Act 1617.] If Mrs Fullarton does not fall directly under these words, I cannot read or understand them. Her right is immediate, not contingent, like that of the other substitutes, who perhaps may never be benefited. Put the case, that by a declarator the lands would have gone to another, then I would not allow deduction of her minority, for she might never reap any benefit from it. That point is settled by the decisions in the case of Mackerston and others; there there was only a *specie successionis*.

OPINIONS UPON ADVISING PETITION, AND ADDITIONAL
PETITION, FOR SIR HEW DALRYMPLE, AND ANSWERS FOR
MRS FULLARTON.

December 6, 1796.

LORD MEADOWBANK.—In order to succeed in her objection to the defender's prescriptive title, the pursuer must make out,

1st, That she would have been successful in declaring an irritancy, and obtaining access to the estate of *Bargany*, against both the late Sir Hew Dalrymple and his brother John, had the action been carried on *pendente minoritate*.

2dly, That an heir of entail having had such a right of action during minority, is entitled to deduct the years of minority from

those pleaded against him as a bar to the action, on the ground of prescription.

FIRST POINT.—In order to make out the first point, the pursuer seems to give her argument merely the character of a *postulatum*; but I think she is only entitled in the present shape of the process to assume as a *postulatum* the matter of fact that she chooses to aver; because she has no opportunity to prove before production is satisfied. She is by no means entitled to assume as a *postulatum* the relevancy of her statement of fact to have entitled her to the success which she ascribes to her action. She has, however, only given a glimpse of what she thinks may be offered on this head, instead of treating the subject fully and formally. But this I apprehend she was bound to do, in order to entitle her to claim a judgment of the Court on the second point, in which alone lies her objection to the exclusive title set up for the defender. This Court cannot listen to an averment that a claim is good in law. It can only listen to averment in fact, and must exercise its own judgment, whether that averment, if proved, would infer that the claim was good in law or not. Indeed, on the footing the pursuer argues, the remotest substitute as well as herself might maintain the objection to the exclusive title. For example: Her sister, Miss Mackay might insist in an action like the present, and aver that Mrs Fullarton had irritated, as well as Sir Hew Dalrymple and Mr Hamilton, and insist that this should be granted her as an admission, since an exclusive title was set up against her, instead of discussing her declarator. It is certainly very clear that the defender would be entitled to say to Miss Mackay, “you must go a little further, and shew how your sister irritated, and satisfy the Court in point of law that you are entitled, upon the facts you aver, to stand and claim, as if she were out of the question.”

As the relevancy, however, has not been fully argued, I shall mention my doubts only shortly, reserving myself open for a more full discussion.

1st, I doubt of the pursuer's interest to have founded a challenge. If an heir of entail in possession shall dispoise to his next heir *alioqui successurus*, I understand it to be settled law, that no substitute heir can challenge the accelerated devolution of the succession. It is held that there is no legal interest to found such challenge. Now, in the present case, the late Sir Hew Dalrymple and Mr Hamilton, both prior substitutes and *prior stirpes*, in the destination to Mrs Fullarton, exchanged situations in the order of succession. It may therefore, I think, be questioned, whether Mrs Fullarton has a legal interest to challenge this exchange.

2d, I doubt whether the transactions which she ascribes to Sir Hew and Mr Hamilton, and maintains to be contraventions of the entail of Bargany, could, though proved, have entitled a substitute, having a competent interest to sue, to obtain a decree of declarator of contravention against them.

She says, Sir Hew irritated, because, after intromitting with rents, he repudiated; and that Mr Hamilton irritated, because he took a charter inverting the succession of the entail.

But intromission with the rents does not in a question *inter hære-*

des operate as a service, or render the heir *eadem persona cum defuncto*. It accordingly creates no obligation to fulfil the obligations which bound the deceased; but merely binds the intromitter to restore the property intromitted with, to those entitled to it. Anciently this passive title operated only *in valorem*, even in favour of creditors; and it never operated farther *inter hæredes*. *Pride, Nov. 26, 1630*. There seems to be nothing averred, therefore, sufficient to infer that an obligation lay upon Sir *Hew Dalrymple* to implement the entail: But though there had, I doubt if mere repudiation could produce an irritancy.

Repudiation does not infer even the passive title of *gestio*, and that too in a question with creditors; although the succession was repudiated in consideration of a sum of money received. (*Scott, creditor of Boswell of Auchinleck v. Boswell's daughter, who had repudiated in favour of the heir-male, 5th July 1666, Stair.*) And it is not alleged that there is any prohibition in the entail to found the pursuer in any argument upon this point.

As to Mr *Hamilton*, again; had he taken the estate as a fee-simple by a grant *a non domino*, it could not be maintained that this would have subjected him in an irritancy. Such a title laid him under no obligation to fulfil the entail. But if the right he reared is well fitted, it may perhaps appear to be as truly alien to the entail, and as incapable of subjecting him to its fetters, as if it had been such a grant *in fee-simple*. On the other hand, if Mr *Hamilton* only changed places with a nearer heir under the entail 1688, I must doubt, from ought I have yet heard, of that being a contravention.

3dly, I doubt extremely that, even though Sir *Hew* and his brother *John* had incurred irritancies, and Mrs *Fullarton* had been entitled to claim access, that this would have entitled her to the character of nearest substitute without declarator. And,

4thly, I doubt whether, after the death of Sir *Hew Dalrymple*, the pursuer can be entitled to declare an irritancy against him, or his descendants.

Why is declarator required at all, but because the acts of contravention are not in general conditions of descent, affording a complete *jus quæsitum* to the next heir called. Restraining clauses are securities for preserving the estate according to the will of the donor; and effect is only given to them for this purpose. But of this I must speak more fully under the second point, and therefore only observe at present, that it is difficult for me to figure a ground for doubting that, granting all the pursuer has said, it would have been competent to Sir *Hew* and Mr *Hamilton* to have purged the irritancies, had action been brought in their lifetime; and that, to admit an action of contravention now, when the first and primary object of such an action has become impracticable, is a matter that deserves great consideration. I will beg leave to ask, whether, to admit such an action would not be to defeat the intention of the donor, who certainly meant, that if the contravener purged the irritancy, he and his descendants should be preferred to the challenger. But though Sir *Hew* could have purged the alleged irritancies, his descendants cannot: so that if the pursuer is right, substitutes would be tempted only to bring challenges after the death of the contravener.

But though these difficulties were obviated, which I confess does not

appear to me a matter to be easily accomplished, it remains for the pursuer to make good her objection to the defender's prescriptive title, viz.

SECOND POINT.—The nearest substitute to whom the right of suing out a declarator of contravention has accrued, is entitled to deduct the years of minority elapsing after that event, in computing the years of prescription, pleaded in bar of the action.

And I acknowledge that I am extremely clear that the pursuer must fail in this attempt. The point is undoubtedly of much subtlety, but nevertheless I esteem it to be of very considerable importance to the law of Scotland;—indeed of such importance that I think the whole law with respect to entails must be thrown loose, if the pursuer's objection is ultimately sustained. I observe it is allowed, even on the part of the pursuer, that this consequence must ensue from her doctrine, that an entail may be effectual, with respect to certain substitutes of the destination, and not with respect to others;—and how the questions that may thence arise shall be extricated upon any known principles, I am unable even to conjecture.

In order to form a sound judgment upon the question, it is necessary to have a distinct conception of the difference between a declarator of contravention and a declarator of property, or a claim to an estate as *verus dominus*.—If there is no material distinction between the nature and object of these actions, the pursuer, in my humble opinion, must be in the right in her objection;—for if, during her minority, the right of the prior heirs and substitutes stood resolved, and the *verum dominium* was in her, and nothing was required but the interposition of Courts of Justice to give efficacy to the right, she ought not now to be prejudged of it on account of the incapacity incident to her youth, or the negligence of her guardians. But if the case stood otherwise, and she had only a title in common with other substitutes to compel the prior heirs to rectify contraventions, and to resolve their right to the property, only in case they failed to redress the wrongs complained of, then, it is plain, that having no legal title to the property, which still remained legally in the contraveners, she was vested with no separate or peculiar interest, differing in legal character from that of any other substitute, or entitled to privileges beyond what the law confers on the *jus actionis* of contravention, that belongs to all substitutes, however remote.—I am free, however, to admit, that the distinction between the rights in the nearest substitute, which entitles to sue a declarator of contravention for his immediate behoof, and that of a *verus dominus* kept from the possession of his estate by a reducible title in the person enjoying it, is not at first sight obvious. At the same time, I apprehend that it may, by a little attention, be distinctly conceived, that it has accordingly been solemnly recognized, and that the greatest effect has been given to it.—I certainly for one, have long been taught to believe in it, nor shall I soon be induced to renounce that belief, or be led to think that Lord *Armiton*, President *Forbes*, President *Craigie*, Justice Clerk *Tinwald*, President *Dundas*, and President *Miller*, mistook a shadowy for a substantial distinction; or that Lords *Hardwicke* and *Mansfield* (the cool spectators of our

law, and therefore not, like disciples, liable to be seduced by its subtleties) were so misled as to fall into the same mistake.

Now it cannot be disputed, that such effect has been given to the distinction, that the minority of the nearest substitute cannot be deducted by a subsequent substitute.—Had Mrs *Fullarton* died, and Miss *Mackay* brought the present action, she could not have deducted her own minority, nor that of Mrs *Fullarton*:—Not her own, because not the nearest substitute.—Not Mrs *Fullarton's*, because she was not in the circumstances of a *vera domina*. It can admit of no controversy, that this point was fixed by the House of Lords, by the decision in the case of *Kinaldy*.—In many other cases, I think the distinction has been adopted specifically, and questions parallel to the present decided.—But I wish at present to assume nothing that can admit of the smallest doubt or dispute, and the case of *Kinaldy* is sufficient for my purpose. Now, no lawyer can doubt that if a minor heir, that had been hurt by a reducible deed, such as a deed on death-bed, dies, his heir, whether of entail or fee-simple, would be entitled to deduct the years of minority from the years of prescription pleaded by the grantee under the death-bed deed. If, therefore, Mrs *Fullarton's* right had been the same with that of a minor hurt by a death-bed deed, it would have been palpable injustice, on the principles of the law of Scotland, to have prevented Miss *Mackay* from deducting Mrs *Fullarton's* minority.—In the former case, the law intends the property for the heir excluded by a death-bed deed; and failing him, for the next heir, and so forth.—But let it be considered, whether the law intends the estate for the substitute, in the general case, when the heir of entail in possession commits an act of contravention.—I apprehend, that in the general case, the law has no such intention. The law means to carry into effect the will of the donor, by which the estate was conferred upon the contravener; but under restraints against spending it, or bequeathing it; and these restraints are created by conferring a *ius crediti* upon the whole substitute heirs, entitling them, severally and equally, to enforce the restraints by action of contravention; the first and direct object of which, accordingly, is, to compel the contravener to purge the irritancies he has committed. But if he is unable to purge them, then the action resolves his right of property in the estate, not from the date of the act of contravention, but from the date of the decree. The deeds of contravention would be effectual without the resolute clauses. If the contravener was unable to get them cancelled, the will of the donor, without the resolute clause, might be defeated; but then the resolute clause does not operate till the contravener has failed to purge the irritancies. The true meaning, therefore, of a declarator of contravention, is an action to secure the estate agreeably to the will of the donor, by compelling the tenant in tail to cancel all deeds done in contravention of the will of the donor, by means of an impending resolution of the *dominium* or property conferred upon the tenant, in case of failure. Nothing can be more obviously different than this species of action from that of a declarator of property and other actions of a similar character; where, though the feudal title of the subject may be in the possessor, the just and legal right is in the claimant, which the possessor can neither dispute nor parry, and where, accordingly, when the feudal title is once rendered litigious, the parties must

join issue upon their rights as they stand. The declarators of property, again, belong only to one person, but any substitute may sue the declarator of contravention; and it is their interest to preserve the estate entire, not that of merely accelerating its descent, which founds the actions of the substitutes.

Farther, from the earliest times, and before the statute which sanctioned entails, it was understood by our lawyers, that the contrivance of the clause of entails was for the purpose of preserving the estate, according to the will of the donor.—The resolution of the property of a contravener in favour of a substitute was only the *remedium ultimum*, and recourse was therefore never had to it except in the extremity, when necessary to employ it for preserving the estate.—Accordingly, Sir Thomas Hope says, *ratio et fines provisionis* is to transmit the inheritance to the heirs of tailzie, unhurt and unprejudiced—and he was acquainted with the very invention of resolute clauses. But if a *jus quæsitum* had accrued to the substitute by the mere act of contravention, so as to entitle the substitute to the *verum dominium*, there could be no reason for purging irritancies.—For the substitute heir could not be deprived of his *jus quæsitum* without his consent; yet irritancies have been purgeable from the very origin of entails, and of course nothing can be more different than the effect of irritancies, and of feudal delinquencies.—In the latter the rule is, *Jus acquisitum tolli potest nemini sine suo consensu ut in apperturia feudi per alienationem sine consensu superioris*; whereas, the consent of the pursuer of a declarator of irritancy was never once thought of as necessary, in order to make way for the purging of irritancies.

I observe that the pursuer has seized, with judgment and ability, the case of a clause of devolution which the defender had, in my opinion, both erroneously and imprudently attempted to assimilate to the ordinary prohibitory and irritant clauses. To me the case of a provision of devolution appears only a happy illustration of the distinction I contend for:—for example, if it is provided, that, upon the heir succeeding to a peerage, the estate should descend to the next substitute, I have no hesitation to consider such a clause as a condition regulating the descent of the estate, and that the retaining the estate after the condition takes place is a mere usurpation, the *verum dominium* passing instantly upon that event to the substitute favoured. But how different this from the retention of the estate by a contravener, which is by no means a usurpation, till after decree of declarator is actually pronounced.—The contravener may make provision for wives, husbands and children, and perform every act permitted by the entail after contravention, as well as before it. But after a condition of devolution has taken place, I apprehend every such act would be reducible, and I conceive there could be no forfeiture of the estate were the peer to commit treason; whereas, treason by the contravener before declarator, would infer forfeiture. I have no difficulty therefore in being of opinion, that in such cases of devolution, not only the first substitute may discount his minority, but that after-substitutes would be entitled to do the same, as in the ordinary case of the claimants of estates in fee-simple.

It does not appear to me material, whether such clauses of devolution are put in the shape of the ordinary restraining clauses or not. It is the legal interest created by the donor in the substitute

which I consider, and to that we are called to give effect. Now, the legal interest which founds the declarator, must, in the general case, be common to all the substitutes, viz. merely a right to see the will of the entail fulfilled agreeably to law, by preserving the estate entire, and in the enjoyment of the more favoured persons, till it be necessary to deprive them of that enjoyment, for the sake of preserving the estate. But this common interest in all the substitutes may be united with separate and different interests, and these be attended with different effects. If, after declarator is obtained, the nearest substitute and his heirs, from minority or otherwise, neglect to make up titles and assume possession; or, if a precise clause of devolution renders the subsequent possessor, though no declarator be brought, a palpable usurpation, these circumstances must have their proper effects. The nearest substitute thereby acquires a direct right to the property, which requires nothing but the interposition of the authority of the magistrate to render effectual, by recognizing it and clothing it with possession; but in the ordinary process of contravention there is no such right conferred before declarator. The legal as well as the former right of property remains with the contravener till the declarator is actually pronounced; and the law understands, that it remains in his power to prevent its ever being pronounced by getting the acts of contravention timeously done away. The nearest substitute, therefore, cannot be *verus dominus*, so long as the contravener remains *verus dominus*. Nor can the nearest substitute claim with justice any interest of a legal defined character, different from that of other substitutes, till he becomes *verus dominus* by the contravener's ceasing to be so. Then, indeed, the contravener's possession is nothing but an usurpation, in the same manner as his possession, whose estate has terminated by the condition specified in a clause of devolution having taken place. An action brought against such an usurper, whether it bears the name of an action of contravention or not, is in substance and effect nowise different from a declarator of property, arising from a right in the pursuer which it perfects, not contingent, and not liable to be disappointed by any act or deed of the usurper, who cannot get quit of the effects of a condition by discharges, retrocessions, or renunciations, as is done where prohibitions *de non alienando et contrahendi debita* have been contravened.

But in the present case the pursuer has not alleged that she was called to the succession by any condition or clause of devolution. All she states is, that a contravention, by infringing the order of succession of the entail, was committed; and on this ground alone she concludes, that she was to be esteemed *vera domina* from the date of that contravention. But I am convinced from the grounds I have stated, that in the eye of the law of *Scotland*, the alleged contravener remains *verus dominus* till decree of declarator shall actually resolve his *dominium* in the estate; that the substantial right, as well as the formal title of *dominium*, remains with the contravener; and of course, that the pursuer was nothing more than any other substitute entitled to an action, competent equally to all and each of them, for preserving the estate in its integrity, agreeably to the will of the entail, and securing its enjoyment and descent according to the legal and established rules of construction of that will. This action belongs to substitutes severally; and, as forming a nu-

merous body, minority cannot interrupt the prescription of such actions. It has not been contended, as far as I observe, on the part of the pursuer, that substitutes in general are entitled to be restored against the omission of bringing actions of contravention in their minority; and it could not be so contended, consistently either with the established doctrines of law pointing out to those to whom, and concerning what subjects this plea of restitution is competent, or with any one decision, so far as I know, regarding the rights of substitutes of entail.

On these grounds I incline at present to be of opinion, not only that the pursuer is not entitled to plead the objection to the exclusive title set up by the defender, but that the objection itself is ill-founded.

LORD JUSTICE CLERK.—The sole question now to be considered is, whether the defender has produced a title sufficient to exclude? The answer to this question depends upon the fact, whether prescription has run upon the charter 1742; and that again hinges upon the point, whether *Mrs Fullarton's* minority is to be deducted.

The act 1617 of prescription is perhaps the most valuable that exists in our statute book, and has always been reputed the safeguard of land rights in *Scotland*. At the period of its enactment, entails, with irritant and resolute clauses, were unknown; and their effect in regard to prescription could not possibly enter into the consideration of the legislature.

Prima facie of the statute, and regarding only its literal meaning, it would seem that every person prosecuting any right to which prescription was opposed, was entitled to a deduction of his minority; but when entails, with irritant and resolute clauses came into fashion, and questions of prescription against them arose, it occurred, that if this rule was strictly and literally adhered to, estates in this situation would cease altogether to become subjects of prescription, as, in the long line of substitutes, it is probable that some minor must always exist. In this manner would a great proportion of the landed property of *Scotland* have been deprived of the benefit of this invaluable statute, and great inexpediency and absurdity have arisen. What, then, was here to be done? The point was somewhat puzzling; but our courts of law, upon a mature consideration of the whole case, adopted a modification of the act 1617. They found that the deduction of minority was to be allowed only to the *verus dominus*, or to the *heir apparent*, who are entitled immediately to take up the estate; but not to substitutes under an entail, whose interest is merely contingent.

This is a doctrine which has been adopted in many cases, and has been sanctioned by a long train of decisions. The pursuer indeed admits the principle, but resists the application of it. She contends that, in consequence of the contravention of *Sir Hew Dalrymple* and *Mr Hamilton*, an irritancy has, by the conception of the entail, been incurred *ipso facto*; and that she, as next substitute, is not only entitled to an Action of Declarator for preserving the estate, but is herself *vera domina*, and consequently entitled to a deduction of her minority.

This is a proposition to which I cannot subscribe. *Mrs Fullarton* is not *vera domina* of this estate, in any sense of the words recognized in law. Let us suppose the case that she is convicted of high treason, would the estate of *Bargany* be forfeited in consequence of her crime?

Certainly not; until she had come into the immediate right of it as an heir of remainder. On the other hand it is equally certain, that if *Mr Hamilton* had been guilty of high treason, this estate would have escheated to the crown during the lives of him and his descendants.

It is not true, as contended by the pursuer, that in the law of *Scotland*, penal irritancies, especially in questions respecting heritable right, are ever allowed to operate *ipso jure*; and surely the present is as *penal* in its nature as can be imagined. The former proprietor, in spite of his contraventions, remains so until his right is resolved by a decree of declarator; and at any time before extract, he is permitted to purge the irritancy if he can. Indeed the Court have always been disposed to make long arms, in order to allow the purgation of irritancies, which are in their nature odious. The case of *Hamilton of Raploch* is a remarkable instance.

Since, therefore, no declarator of irritancy was brought until the years of prescription had elapsed, it is impossible to consider the pursuer as having been *vera domina*. She was merely a substitute, with nothing more in her than a right of expectance until such declarator was obtained. I am unable to distinguish between her and the other substitutes. They, too, had equally a right of expectancy, only somewhat weaker, because more remote; and in its legal nature and effect precisely similar.

The pursuer has ingeniously endeavoured to draw a line of distinction between this and the cases quoted as precedents on the other side. But the differences which have been alleged do not affect the general principle, upon which, I am satisfied, all of them were decided; and that of *Auchindachy* is precise in point with the present.

My opinion upon the question at issue is perfectly decided, and I am clearly for altering the interlocutor.

LORD ESKGROVE.—I still remain of the opinion I formerly delivered. At present I give no opinion on the merits or probable issue of the declarator; and when it comes to be regularly discussed, I may perhaps think it unfounded. In this stage of the cause we must take it for granted, that when she is at liberty, the pursuer will shew relevant grounds for her action; but if the plea to exclude is sustained, she never can have an opportunity of doing so. I feel a reluctance to prevent the party from being heard, and thus to stifle her cause in its very birth. At the same time I should be sorry that the law of prescription was frustrated; for I respect it as a most valuable security. It has been said, that at the date of the act 1617, entails were not known in *Scotland* in their present form, and that this statute was not meant to affect them. This is an idea which I by no means can go into. I will not say how far entails in their present form, as afterwards sanctioned by the act 1685, c. 22, were then known; but by the words of the statute 1617, it is expressly established, that all persons possessing lands upon a charter and *saime ex facie regular*, shall not be disturbed; and it concludes with a general exception of minority.—(Quoted the words of the act.) It has been sometimes made a question whether the exception of minority was applicable to the positive as well as the negative prescription, but the Court has repeatedly found that it was equally so to both, and the question is now at rest. I was always of that opinion, for the reason of the thing holds equally as to both.

But this is a case of entail, and is on that account supposed to be different. A distinction, however, does not seem obvious. By the words of the entail it is expressly declared that contravention shall *ipso facto* be followed by forfeiture; and entails in this form are fully sanctioned by the act 1685. But the legislature in 1617 could not, it is said, have entails of this kind in view; and, in order to remedy supposed inconveniences which might ensue, our Court has assumed a legislative authority to modify the act in its application to cases of this nature: For it is contended, that otherwise no length of possession could secure against the effect of antiquated entails. And if this is admitted, what shall be said of the case which must then occur, of an heir in possession upon titles different from those of the entail, being saved altogether from the operation of minority. This would be truly a singularity, and different from the situation of every other possessor acquiring a prescriptive right to his estate. I entertain a very great respect for the authority of our great lawyers whose names have been mentioned, but must think they exceed the limit of their judicial powers; and I cannot adopt the doctrine which I have heard imputed to them; for in fact, its tendency is to repeal to a certain extent the act 1617. Against whom (to employ the words of the statute) is *prescription here used and objected*? Is it not against *Mrs Fullarton*? And what is there to distinguish her situation from that of other minors who have the benefit of this deduction? I can see no distinction by which her claim can be injured; and if the question had now occurred for the first time, I cannot help thinking that no Judge would have hesitated in forming the same opinion. But it is said that in the application of the act 1617 a new rule is requisite for the case of heirs of entail, who constitute a collective body, each member of which, even the most remote from immediate possession, had an equal right of challenge,—and some one of whom, in the ordinary course of things, must always be of age. If this is really an evil, and if any alteration or new regulation be here requisite, it must be the work of the legislature, and it is not within the competency of a court of law. At any rate, the remedy proposed goes by much too far. It is said that only the *verus dominus* shall be entitled to a deduction of minority, and it is held that an heir of entail claiming in consequence of a contravention, is not to be considered as a *verus dominus* until a decree of declarator has been obtained. What then is meant by *verus dominus*; and in what consists the *verum dominium*? It is not constituted by a feudal title, for it is admitted that a person claiming an estate, although his titles are not made up, may be the *verus dominus*; and it is contended, that so likewise may be a person whose titles stand unreduced until he be actually denuded. All this leads into a mere puzzle. The *verus dominus* in this case is the *dominus litis*. *Mrs Fullarton* is entitled to take the estate in preference to every other heir of the entail, and it is most extraordinary to say that she is not entitled to plead her minority, because she was not in possession; since, if she had once been fortunate enough to obtain previous possession, she had no further occasion to resort to the plea of minority. Her plea is rejected because she was destitute of that possession which it is the very object of her plea to obtain. The present case is very different from that of a remoter substitute pleading upon the minority of a nearer, as

in the case of *Kinaldy*. There the admission of such a plea would have been highly inexpedient. The heir of *Kinaldy* could not have taken the estate. He could only have pursued a declarator to preserve the estate; and there was no occasion to give him the advantage of another minority, as he alone might have pursued without the concurrence of the nearer substitutes, and had himself been of age for more than forty years. Here, on the contrary, *Mrs Fullarton* is claiming, as nearest heir of entail, immediate possession, and asks deduction of no minority but her own. She is pleading in the very words of the statute 1617.—Who else, during the period of prescription, was *verus dominus* to the effect of claiming a deduction of minority?—*Mr Hamilton* is said to be *verus dominus*; but was *Mr Hamilton* to challenge himself? In cases of death-bed deeds, which are good until reduced, the grantee may be called the *verus dominus*; yet the minority of the heir at law will be deducted from the positive prescription.—In what respect, as to the point before us, is a declarator of irritancy different? If there be any distinction, the latter is of the two the strongest case. If the plea of minority is here rejected, then no possible case of the application of the act 1617 to entails can ever exist. Upon the principle contended for, it must necessarily follow, that although an action of declarator is brought in the thirty-ninth year, yet if decree is not obtained till after the lapse of the fortieth, the plea of minority will not avail, to save the claim from the effect of prescription. Upon the whole, I am very clear for adhering to this interlocutor.

LORD SWINTON.—I entirely agree in the opinion that has now been given, and am for adhering to the interlocutor. The question appears to me to lie within a very narrow compass. The act 1617 expressly requires minority to be deducted. *Mrs Fullarton* pleads, that, as the person entitled to possession, her minority ought to be deducted. To this it is answered by the defenders, "You are not the next heir, and your minority cannot be deducted." *Mrs Fullarton* replies to this, that, when permitted, she is willing to shew that she is.—Will you deny her the opportunity of doing so? This would be very hard indeed. Suppose a parallel case.—A person knocks at my door for admittance, and says he is my son.—I stand within and refuse to unbolt the door, until he has proved to my satisfaction that he really is so: He begs me only to open the door and peep out, and I will instantly recognize him. "No," says I, "I wont open the door, and wont look out; so get you gone."—Would this be fair? In my opinion *Mrs Fullarton's* case is just the same.

LORD DREGHORN.—I was not present in Court when this cause was formerly advised, but I am satisfied that the interlocutor then pronounced was perfectly right.

LORD DUNSINNAN.—I have again considered the arguments on both sides in this cause, with all the attention in my power, but have found no reason to alter my former opinion. I am for adhering to the interlocutor.

LORD PRESIDENT.—The question is, Whether the period of *Mrs Fullarton's* minority ought to be deducted from the years of pre-

scription? This is one of these points which ought to have been considered as at rest in the Law of Scotland; all the decisions upon the subject, from the first starting of the question in 1759 down to the present day, being uniform against the deduction: and some of them ultimately settled in the House of Lords.

It was some time a doubt, whether, in the construction of the act 1617, minority could in any case be allowed as a deduction from the *positive* prescription, the clause relative thereto being introduced in the end of the act, after treating of the *negative* prescription: and somewhat contradictory to the strong declaration contained in the preceding part of it, that the positive prescription should be opened, "upon no other ground, reason, or argument competent of law, except falsehood." It has, however, been settled by decisions, that the subsequent exception of minority applies to both; and upon these the Court ought to rest.

But the present point has been no less firmly fixed by authority of the same kind, and in a still greater number of instances, where the question was most deliberately considered, viz That in the cases of latent entails, the minority of substitute heirs, whether nearer to the succession or more remote, could have no effect, and the grounds are obvious. In the first place, as observed by Lord Kilkerran in the case of *Macdougall*, that if the minority or infancy of heirs in *spe* were to be considered, it would be impossible that prescription could ever take place against a tailzie. 2dly. That in the case of prescription running against a collective body of men, some of whom may be major, others minors, the exception cannot apply as in the case of an individual: And 3dly. That the positive prescription must always in its nature suppose and imply two contending parties in a right of ownership, the *verus dominus* losing by prescription, and the *non dominus* acquiring; whereas substitute heirs who are only in *spe*, and who have only a personal right of challenge for the purpose of making an entail effectual, are not either in the one situation or the other.

The first of these reasons, having expediency for its basis, might not alone be sufficient, and therefore it is unnecessary to enlarge upon it.

As to the second, the words of the exception in the Act 1617 are, that only the years during which the parties against whom prescription is used and objected were majors, shall be counted. But in the case of an entail, it remains to be considered who is the party against whom the prescription is running. The person who is acquiring, is the heir in possession, who has made up a wrong title, in order to shake himself loose of the tailzie, or of some limitation or fetter contained in it; but the party who is losing, and against whom the prescription is to be pleaded, is not any individual. It is the substitute heirs of entail in a body, who have all and each of them the precise same right or challenge, and the precise same remedy, though the application of the remedy may operate more to the advantage of one than of another, as he happened to be more near to the succession, or more remote from it; and as it never can be said of this or of any collective body of men, that it is in a state of minority, so it is of no consequence in a question of prescription, either positive or negative, that some one or more of the individuals which compose this body may happen to be under age. Some of them are perhaps unborn when the prescription begins—some have only come into existence yesterday—some are of one age and some of another.

All this is nothing to the purpose. We cannot suppose prescription running against one individual of this mass, and not against another. The right belonging to the whole is of the same nature, it belongs to a *familia*, and either the prescription must run against the whole, or against none.

The interest which the substitute heirs of entail have in the estate, before the succession opens to them individually, is an undivided and *indivisible* right. If it were only undivided and not also indivisible, like the interest, which, by the Law of *Scotland*, different heritors of land have in a common, it might be said that *A. B.*'s right can be lost, while *C. D.*'s is preserved entire ;—but in the case of an indivisible right, the whole of which belongs equally to all, and does not admit of being separated into parts, the same consequence cannot follow.

Rights belonging to communities are of this nature, such as Corporations, Hospitals, &c. Rights belonging to the whole body of the people are of the same nature, *e. g.* the rights of a highway, or the right of freedom from tolls or customs of a market. A piece of ground which was formerly a highway, being inclosed and possessed as exclusive property for forty years, without interruption, will be acquired by prescription from the public, though many individuals have been under age during that time ; and if there has been a possession of levying certain tolls or customs at a fair or market, in consequence of some title which might have been challenged during the period of prescription, it will be too late to come afterwards with such a challenge, at the instance of any individual, upon a plea of minority. The right cannot be acquired as to some, and saved as to others. An express interruption will save it as to the whole, but the personal privilege of minority can be of no avail.

Neither can it be said, that any disadvantage arises to the public from this circumstance ; for the hardship on the one hand, is more than balanced by the chance on the other, that, when there are so many individuals concerned, acts of positive interruption will be used by some one or other among them, which, by the rules of prescription, must operate in favour of the whole. In short, the minority of individuals in such a case, is not that minority which the statute has in view.

But, 3dly, The prescription here pleaded against the substitute heirs of entail in a body, including *Mrs Fullarton*, being the *positive prescription* upon charter and sasine, the same must be effectual against her, unless she can say that the right of property was truly in her, during the currency of prescription, in which case, but in no other, she would be entitled to plead that her minority must be deducted. It is clear, however, that the property neither was nor could be in her, unless either the whole prior heirs had failed by death, or a decree of declarator of reduction had been obtained by her in the Court of Session, setting aside the right of those prior heirs, and opening up the succession to her, so as to give her immediate access to claim the possession.

In such a case, she would have been the *vera domina*, or real owner, losing by prescription, while she neglected to make her right effectual ; and *Mr Hamilton* would have been the *non dominus*, continuing to acquire by a title fundamentally bad.

And here we must attend to the principles which regulate a *Scots* entail ; these being essentially different from those of an *English* entail. With us not one particle of the *fee* is in the substitute heirs.

The whole vests in the heir in possession. Each substitute heir, whether called generally or specially, whether of the body of the tailier, or not of his body, has in him nothing more than a personal right of maintaining actions to force implement of the tailzie, or to challenge contravention ; and this is a right which equally vests in every existing heir, or who may exist so long as the estimation lasts. We have no such thing as an estate in remainder, the whole estate being in one person, viz. *the heir in possession* : and, upon the death of one such heir, it remains in *hereditate jacente* till it is taken up by another heir. All this was fully explained and illustrated in the case of *Gordon of Park* ; and any person not already informed of the principles which were there laid down and recognized upon all hands, may look at the correspondence which passed between Lord Chancellor *Hardwicke* and Lord *Kames* upon the subject.—See Lord *Kames's* *Elucidations*, Art. 42. respecting entails.

The estate can never open, nor the possession of it be claimed by the succeeding or subsequent heir, till one of two things happens ; either 1st, That the preceding heir dies, in which case, the next heir can immediately enter into possession, even while he is in a state of ap-parency, i. e. before he expedes a title by service in the common form ; or, 2dly, That the heir in possession is ousted and deprived of his right by a declarator of irritancy, and reduction obtained in the Court of Session, at the suit of some one or other of the other heirs called in the destination ; for even the remotest heir, having exactly the same title with the nearest to force implement, and to challenge contravention, such heir, however remote, may insist in the suit, to the effect, however, not of bringing the estate immediately to him-self, but of bringing it a step nearer to him, by making it devolve on the nearest in succession, who has not contravened. When this hap-pens, the contravening heir is *civiliter mortuus*, and the next heir be-comes the *verus dominus* of the estate. But, if he does not choose, after such declarator is obtained, to avail himself of his right, and the former heir is allowed, for another period of forty years, to continue his possession, upon his charter and sasine, however bad, without any new challenge, at the instance of any person, and if the *verus domi-nus* has not been minor during a part of that time, prescription will again take place, and the Act 1617 puts an end to all inquiry, whe-ther the title is good or bad ; nor will the minority of any one of the subsequent heirs, i. e. any of those who can only take after the heir in possession, and after the *verus dominus*, who was entitled to pos-session, be of any avail to stop the prescription ; because the positive prescription stands entirely independent of that personal right of challenge, which they have lost by their negligence. If the *positive* prescription were out of the question, and if they had nothing but the negative to struggle with, the argument would be a great deal more plausible, viz. that the personal right of challenge could not be lost during their minority, more than any other demand of a personal na-ture, though even there they would meet with the difficulty already suggested under the second head, viz. that a collective body of men is never minor. But we are now speaking of the *positive* prescrip-tion, with respect to which the argument is still more conclusive a-against them, because we are not here to look to contingent interests of any kind, nor to mere personal ground of action, but singly to this, whether the property of the estate is carried from one person to an-other, from an alleged *verus dominus* to an alleged *quasi dominus*, up-on a title by charter and sasine in the last, and possession continued

for forty years without challenge or interruption ; against which it is a clear proposition that no minority, except that of the *verus dominus*, can be obtruded.

It is not enough to say, that *Mrs Fullarton* might have taken steps at an earlier period to put herself in the situation of *vera domina*. The answer is, that she did not : and in the mean time, the party in possession continued, in the sense of law, to have the character both of *verus dominus* and *non dominus*.

The positive prescription is much favoured by the law of *Scotland*. It is very different from the Roman *usucapio*, which required only one year in moveables, and two in immoveables, and required no other title but possession. Here we require a title by charter and sasine, confirmed by a possession of forty years without interruption. This we justly presume to be sound, and scarcely admit any thing to be stated to the contrary. The Act 1617 is the great charter of our properties, and ought not to be narrowed.

It is said that, in the case of a devolving clause, when the heir in possession is taken bound, in a certain event, to denude in favour of another, the party in whose favour such a clause operates, is to be considered as the *verus dominus*, whose minority would interrupt.

If this means, that the property becomes thereby transferred *ipso jure*, as soon as the event happens, without action or process to make it effectual, it is believed no such decision will be found. Neither will any instance be found, where minority was allowed as a deduction in the case of a devolving clause, more than a clause of irritancy before decreet of declarator actually obtained. At the same time, in the case of a devolving clause, there is only one individual against another, so that the circumstances are not exactly the same ; but till the question occurs, and is formally tried, we can say very little about it.

It is said that *Mrs Fullarton*, having been the nearest heir to the late *Mr Hamilton of Bargany*, under the entail, the legal consequence of this contravention was, to give her a direct and immediate claim to the estate ; and therefore she is in a better situation than any of the after heirs, and is ought to be held that she was the *vera dominus* from the period of the actual contravention, and as the person or party against whom the prescription was running, while it is admitted that the other heirs, who were only *in spe*, could not be so held.

But the argument proceeds upon an evident mistake in point of law. No irritancy operates *ipso jure* without the aid of a decree of the proper Court ; and no words, however strong, inserted in any deed of entail, can dispense with this legal and essential requisite. The party who alleges contravention must go to a Court of Law, and make out his proposition ; and it happens every day that irritancies, even when incurred, are allowed to be purged. Every defence is allowed against the penal consequence of forfeiture. Thus, if the vassal neglects to pay his feu-duty for two years, or the tenant to pay his rent, the Superior or Landlord may pursue a declarator of irritancy, but he cannot turn out the contravener *brevi manu*, nor will even a simple process of removing be sufficient for the purpose.

In the case of an entail, no lawyer ever dreamt that even the most glaring and palpable contravention could operate without declarator ; and even with declarator it is seldom easy to prevail in such a question.

If *Mrs Fullarton's* argument could be supported, she would, on the same grounds, be entitled to the rents of the estate of *Bargany*, from

the period that she says *Mr Hamilton* committed an act of contravention ; but her counsel know that to claim these would be a very wild attempt.

Whether she would have been successful or not, in declaring an irritancy against *Mr Hamilton*, we have not at present sufficient materials before us to judge. There are many difficulties, independent of prescription, which might have then, and may still, stand in her way ; and it is scarcely fair to take it for granted, before the case is tried, that independent of prescription, she must prevail. But it is no matter whether she would or would not. It is enough to say, no such declarator was brought, far less any decree obtained ; and therefore, *Mrs Fullarton* was all along merely *in spe*, just as much as the remotest heir of entail ; nor is it possible, in the present question, to distinguish between her and any other heir. The different heirs of entail have a *jus crediti* under it. The heir in possession may be considered as the debtor, and the subsequent heirs as the creditors ; and it is to the case of debtor and creditor that the negative prescription applies. But the positive prescription does not apply to that case, but to quite a different one, viz. to that of owner and owner, two contending parties in a right of ownership ; or, according to the usual phrase of our Lawyers upon this subject, to a *verus dominus* and a *non dominus*.

It seemed to be admitted, that it would be too much to allow the minority of every subsequent heir to be deducted ; but it was said, Why not allow each heir to plead his minority, though he cannot plead that of another ? Suppose, then, the heir next to the possession has lived forty years, and twenty of these in minority, he dies, and leaves a son, just born, who consequently must be minor for twenty-one years more, and the succession opens to this person in the eighteenth year ; it must be found, according to this system, that he is barred by prescription, viz. the forty years which elapsed during his father's lifetime, whose minority he cannot plead. Yet, had the father happened to be then living, the prescription, according to the same system, would not have been good against him ; so that here is a most extraordinary case, where one minority is good, and two minorities of no avail whatever.

But even if we could suppose that this question was originally attended with any doubt, is it not a most grievous circumstance, that a point of law, so firmly established by the most solemn decisions, both here and in the House of Lords, for half a century past, should now be pulled up by the roots ? What right have we to set up our own wisdom against that of so many of our predecessors in office ? It was said in my hearing, by the late President *Dundas*, that these decisions were approved of by President *Forbes*, old President *Arniston*, President *Craigie*, Justice Clerk *Erskine*, and other great Judges in this end of the Island ; and by Lord *Hardwicke* and Lord *Mansfield* in the other.

In the case of *Macdougall of Mackerston*, in 1739, the first heir in succession next to the contravener, as well as the contravener himself, was under age, and so was the second heir ; but these minorities were not regarded. In the case of *Aytoun* against *Monypenny*, in 1756, prescription was sustained in the House of Lords, and the minority of the substitute next to the heir in possession, though pleaded upon, does not seem to have been regarded.

In the case of *Gordon of Whiteley*, in 1784, the whole argument was again heard in presence, and the minority of the next substitute again disallowed. A distinction has been suggested between that case

and the present, viz. that there was no irritant clause there; and therefore, the next heir could not have got immediate possession. But this is nothing to the purpose: The argument, both at the Bar and upon the Bench, in that case, did not go upon any such speciality, which, it is believed, was not so much as mentioned. The whole discussion was upon the general topics already suggested; and it is clear that the heir, whose minority was objected, had the first and most immediate interest in the question, whether possession could immediately be attained or not? In the former case of *Macdougall*, there was no want of any of the clauses, and yet the judgment was the same.

Last of all followed the case of *Auchindachy* against *Grant*, in 1792, which was also in point to the present case; but the prescription was sustained, and the deduction of minority over-ruled, both here and in the House of Lords. The argument, indeed, was very slight upon either side in that case; but why was it so? Because it was considered as a point at rest.



APPENDIX. II.

NOTES OF THE OPINIONS OF THE JUDGES OF THE COURT OF SESSION, AT ADVISING THE CAUSE BETWEEN THE HONOURABLE MRS FULLARTON AND SIR HEW HAMILTON DALRYMPLE, BART. ON THE 23D NOVEMBER 1798.

LORD MEADOWBANK.—When the cause was advised by this Court in December 1796, it appeared to me, that the pursuer, before she could succeed in her objection to the sufficiency of the exclusive title, set up in defence, was bound to shew, in the *first* place, That, from her statement in point of fact, it would follow in point of law, that she ought to have been successful in her present claim to the estate of Bargany, had that claim been brought in her minority, or within forty years from the investiture 1742; or, in other words, that, in point of law, she was entitled to be considered as first substitute under the entail of Bargany, Sir Hew Dalrymple, and his brother, Mr John Hamilton, having committed a fatal contravention, which could not be purged, which, without declarator, constituted her first substitute, and which gave her immediate access to the estate: And *2dly*, As to the objection itself, that, though a substitute heir of entail, she was entitled, as being first substitute, to have her minority deducted from the years of the positive prescription, which, following on the investiture 1742, formed that title which the defender maintained was exclusive.

I then thought that the pursuer, by having neglected to argue formally, and establish the relevancy of her allegations upon the first of these points, was not entitled to claim a judgment of your Lordships upon the second, which alone had been fully treated. At the same time, after expressing the doubts which had occurred to me of the relevancy of her allegations on the first point, I had no difficulty as to the second point, in being very clearly of opinion, that her claim to have her years of minority deducted, was ill-founded.

At that time, such of your Lordships as agreed with me in this last opinion, holding it immaterial whether the pursuer was to be considered as the first or as a remoter substitute, for that in either case the years of her minority could form no *vitium* in the positive prescription pleaded for the defender, did not think it necessary to insist upon the pursuer's arguing the relevancy of those claims which she alleged ought to have been brought by her within the years of prescription; and the majority of the Court, that were of a different opinion on the question of the deduction of minority, permitted the pursuer to assume it as a *postulatum*, that her claim to be accounted nearest substitute, was at least, *in hoc statu*, well founded: and, of consequence, your Lordships pronounced an interlocutor, finding that she was entitled to have the years of her minority deducted.

This interlocutor having been carried to the House of Lords, the cause has been remitted to us, with a special direction, by which I think we are called upon, with sufficient clearness, to consider the relevancy of the pursuer's title to the character she assumes of first substitute, and then to determine, if we find it relevant, or perhaps though we find it not relevant, whether the validity of the defen-

der's title is thereby impeached or not. The words of the remit are these, which I think plainly confine us to the discussion of the pursuer's objections to the defender's exclusive title, and to try the relevancy of those objections, without permitting her to assume any *postulata* in point of law :—(*Reads words of remit.*)

In the *first* place, therefore, I lay totally out of my consideration the fifth question argued in the memorial for the pursuer, which resolves into a claim to the benefit of that exclusive title, which it has been her object in all the rest of the litigation to impugn. The remit of the House of Lords plainly considers this exclusive title as belonging to the defender, and the object of the remit is to try her objections to the validity of that title, not to enquire which of the parties had the best right to it. Besides, I cannot help thinking, that if the pursuer means seriously to maintain a claim to the benefit of this title, she must admit, that this action, as originally directed against the late John Hamilton, and the investiture 1742, was ill-founded, and that, after his death, instead of joining issue with the present defender, as in right of that title, she ought to have contented herself with challenging the investiture 1780, in order to make way for taking up the succession as heir under the investiture 1742. Whether, however, she has, in this manner, barred herself from laying claim to the investiture 1742, we are not called upon to consider. But, at any rate, there appears to be no doubt that this claim is totally foreign to the object of the remit of the House of Lords.

As to the relevancy of the pursuer's claim to Bargany, had it been made *tempestivè*, she has undertaken, or must be held to have undertaken, to establish all and each of the following propositions :

1st, That she was entitled to complain of a violation of the will of the tailzier, when the late Sir Hew Dalrymple, and his brother, Mr Hamilton, attempted to change situations in the actual enjoyment of the estate of Bargany, although both of them were called to the succession before her by the terms of the entail.

2^d, That Sir Hew Dalrymple, the nearest heir, by taking possession of the rents of the estate while heir-apparent, subjected himself to the fetters of the entail.

3^d, That Sir Hew forfeited the succession for himself and his descendants, when he repudiated the estate, laid down the name and arms, and contributed some aid to his brother in making up a title to the estate, which, though an innovation in the succession of the entail, and irregular in point of law, was capable of being rendered valid by prescription.

4th, That Mr Hamilton forfeited, by taking such a title to the estate against the will of the tailzier.

5th, That these contraventions were not purgeable.

6th, That the fact of these contraventions having been committed, was singly, without declarator, sufficient to deprive Mr Hamilton, and the descendants of Sir Hew, of their rights of nearest substitutes, and to vest that character in the pursuer, so as to render her *vera domina*, or the person who had the true right to the estate of Bargany, and so entitled to deduct her years of minority from the prescription said to be running against her.

7th, That the delay which has occurred, of not bringing the action till after the death of Sir Hew, the alleged contravener, is not a bar fatal to the pursuer's now insisting in having the contravention declared, and the rights of his descendants resolved.

I presume there can be no doubt that the pursuer is bound to establish all and each of these propositions to the satisfaction of your Lordships, as legal consequences of the allegations in point of fact stated to the Court, before she can claim an adherence to the interlocutor of 6th December; for, as I understand, it was not then the opinion of any of your Lordships, that it was competent to every substitute, or to any except the first, to have the years of minority deducted from the positive prescription. It is very true, mention has been made to your Lordships of a different doctrine having been elsewhere entertained. But the pursuer's counsel, excepting the opening counsel at the hearing last summer, have not thought proper to argue it in this Court, and most certainly there is nothing in the remit of the House of Lords that gives the smallest countenance to it; on the contrary, we are called on to discuss the pursuer's title to the character of nearest substitute, and to judge whether that character impeached the validity of the exclusive title: whereas this discussion would have been altogether superfluous, if the minority of any substitute, however remote, was to operate as a bar to the currency of the positive prescription. It is plain, therefore, that the contravention of the late John Hamilton, though I do not observe it formally maintained in the pursuer's memorial, is as necessary for the pursuer to maintain, as that of the late Sir Hew Dalrymple.

I do not propose to speak in detail as to all the foregoing propositions. I wish to abstain from repeating what has been formerly said; and perhaps it might be sufficient for me to say, that the doubts I expressed in December 1796, except, perhaps, those on the first of the seven propositions above enumerated, have not been removed by the very able discussion of the subject of them which has since taken place. On some of them, however, I shall beg leave to say a few words.

As to the circumstances in which Sir Hew stood when the transactions complained of took place, I think it is sufficiently made out in the minute distributed last night, that Sir Hew Dalrymple was heir-apparent under the standing investiture of the estate, and so entitled to the possession of the estate, till compelled to denude in terms of the entail 1688, by those having interest under it. I looked into the appeal cases 1739, in the competition between Sir Alexander Hope, Miss Buchan, and Sir Hew Dalrymple. But though the statement of the titles there is loose and contradictory, I conceive we may depend on the fact, that William Lord Bargany did not expedite a charter under the old investiture, as stated in the case for Miss Buchan, but merely obtained a service, and precept of seisin from Chancery, thereby continuing the investiture of 1633, which stood in favour of the heirs-male and assignees of the first Lord Bargany. If Lord William had expedite a new charter under the old investiture, whereby he himself and his heirs-male would have been the grantees of the investiture, it is plain his granddaughter, Miss Buchan, would, by the failure of heirs-male, have been the heir under that investiture, and that such charter and infestment of Lord William would have extinguished the procuratory of resignation in the tailzie 1688. It would therefore have been altogether inept to have proceeded to make up titles under that procuratory, as was done in 1742. Miss Buchan must have been com-

2d Propo-
sition con-
sidered.

pelled to make up titles, and denude by proceedings competent for that purpose.

But if Sir Hew was heir-apparent under the old investiture 1633, which was certainly his proper title of possession, it does not seem obvious how his intromissions with the rents of Bargany can be imputed to his character of nearest substitute under the entail 1688, which was still personal, and only created an obligation on the heir of the investiture to denude. At the same time, I have no difficulty in being of opinion, that though his intromissions were to be imputed to the character of apparent-heir under the personal deed of entail, still that intromission could not subject him conclusively to the fetters of the entail, and put him in the capacity of forfeiting an estate which was not in him. Mr Erskine says expressly, "That
 B. 3, tit. 8, sec. 86. " as passive titles have been received into our law, merely for the
 " security of creditors, therefore, where questions arise concerning
 " behaviour among the different orders of heirs, in which creditors
 " have no concern, the heirs are not liable to one another *in solidum*,
 " but are only accountable *in valorem* of their several intromissions;" which is, in other words, merely saying, that this sort of intromission, in a question among heirs, remained on its original footing as it stood under our old feudal law, before the institution of this Court: for, by that law, intromission created nothing but an obligation to repay to those having interest, since it subjected to none of the conditions upon which the estate was held. The heir-apparent in possession was liable in none of the feudal services, nor subject to any of the casualties to which the proprietor was liable. The superior might take his declarator of non-entry, and assume possession; but if he did not take possession, he could take nothing else, not even the single avail of marriage, till after the heir had entered. But if taking possession of the estate did not subject the heir to the conditions of the grant from the superior, I think it is impossible to hold, that it should subject him conclusively, and as a matter of course, to the conditions of an entail, by which he was entitled to enter to the property. It is accordingly the actual entry as heir, which all our lawyers state as the step which, if once taken, cannot be retracted, while the naked taking possession had no other effect among heirs than to render the intromitter accountable for what he received. The taking possession, therefore, cannot be held to go farther than to intimate an intention of entering. But if an heir of entail alters his purpose, and chuses to abandon the possession, I cannot see on what ground any substitute could challenge such a proceeding as a contravention of an entail, where no prohibition against lying out unentered is expressed. I observe, that in the deed of repudiation, Sir Hew conveys the bygone rents to Mr Hamilton. But though this might be proper *ob majorem cautelam*, or to prevent all ground of complaint, I do not conceive that there could be any necessity in point of law, even for that measure, at least from the terms of the entail of Bargany, which, I think it very clear, is the only entail that the pursuer is in this cause entitled to found upon.

3d Proposition.

But if Sir Hew could not contravene an entail which he had not bound himself to accept, nor forfeit a property which he had abstained from assuming, it is plain, that his entering into a combination with his brother to enable him to get hold of the estate, as if he

had stood before him in the line of succession, cannot be a contravention on the part of Sir Hew. Whether it was so on the part of Mr Hamilton, is not, I think, a more difficult question.

I am of opinion, that a donatar of non-entry from the Prince might 4th Propo-
see on what ground a substitute could have got him forfeited as a con-
travener. The pursuer said, that he should have brought a declarator
of contravention against Sir Hew, for abandoning the possession,
and not making up titles. But I have stated my reasons for thinking
that there was no ground for such a procedure; and it is very plain,
that the pursuer, a substitute under the entail of Bargany, could not
give him any trouble upon the terms of the deeds relative to North
Berwick. All the pursuer, therefore, has to complain of is, that
when nearest substitute, Mr Hamilton took up the estate in the same
manner as if he had been the nearest heir, instead of suffering it to
fall into non-entry, the casualty of which the Prince of Scotland
might have gifted to any of his friends, till Sir Hew or his descend-
ants chose to enter. And what better would the pursuer have been,
had this been done? The right of succession must have remained
entire in the family of North Berwick: she must have remained as
remote a substitute as ever. The title taken by Mr Hamilton cannot
have served her worse than this, nor disappointed more the intention
of the tailzier. It is likewise very difficult to conceive, that the taking
prematurely an estate, should be deemed a contravention by the
taker. The innovation prohibited seems to be entirely levelled
against the grantor, not against the grantee. I must doubt, there-
fore, both of Mr Hamilton having contravened, and of the pursuer's
interest to challenge what he did.

The same circumstances which I have just mentioned, show, if the 5th Propo-
transactions 1742 were deemed contraventions, how they might be sition.
purged. An action at the instance of any of Sir Hew's children would,
I think, have done away the hazard of their being postponed to Mr
Hamilton's issue; or if Sir Hew and Mr Hamilton could have pre-
vailed on the superior to challenge the investiture 1742, and insist to
enter into possession, as being without a vassal legally entitled to the
estate; every thing would then have been restored precisely to where
it stood, and the estate must have fallen back into non-entry, and in-
to the possession of the superior, without any forfeiture whatever.
But the investiture 1742 is now invincible by the superior.

As to the necessity of a declarator, to entitle the pursuer to the 6th Propo-
character of next substitute, and so, as alleged, *vera domina*, I shall sition.
say nothing in addition to what I formerly stated, except that as all
that is complained of might thus have been completely undone, there
can be no doubt that any declarator she might have brought in her
minority, was something very different from a declarator of property,
accompanied with a reduction of what stands in the way of the *rei*
vindicatio, or that sort of declarator of contravention which may be
considered as merely ascertaining a simple condition of descent, e.g.
where, on the succession to a Peerage, an estate is provided to de-
volve on the next heir, who is a commoner. There, indeed, the de-
clarator admits of no defence, and merely operates as a service;
whereas in the case put, it was to remedy an innovation of succes-
sion, which might be completely remedied, and every thing placed
in statu quo.

7th Proposition.

But if the alleged contraveners might have purged, before prescription had run against the superior, as heritable debts may be got renounced, sales surrendered, and so forth, will the law permit them to delay till the contraveners die, and prescription is run against the superior, and still give the full penal effects of forfeiting the property to the action of contravention? Entails, no doubt, must contain both irritant and resolute clauses, to have the efficacy intended for them by the statute; but actions proceeding on these clauses may competently effect an irritancy without a resolution: And it surely may admit of serious consideration, whether it is agreeable to the genius of our law, to allow of an action to forfeit, when, by the pursuer's fault, a delay has occurred which excludes the defender from the means of avoiding so penal a consequence. Craig has long ago observed, that the *leviores pœnæ* are always adopted by our law, and that it is slow to inflict any thing of a penal consequence, on a failure to implement an obligation. Witness the law as to legal and conventional irritancies, &c.; and whatever the pursuer may argue, it seems to me impossible to doubt, that contravention *sapit naturam delicti*, and that forfeiture in consequence of it, especially when reaching to the offspring of the contravener, is a most severe punishment; and, after all, in the present case, are not the contraventions complained of now done away, and things exactly placed agreeably to the destination of the entail, which, on the contrary, the pursuer's success would completely invert?

Second Point.—Is there any part of the period of the term of possession required in composing the prescriptive title pleaded on by the defender, to be deducted on account of the minority of the pursuer, though held to have been first substitute?

The argument for the pursuer, when the cause was before your Lordships in 1796, went entirely to show, that she, as substitute of an entail, who, as she alleged, was, in consequence of acts of contravention, entitled to obtain decree resolving the right of the contravener, but to take the estate as nearest in the succession, ought therefore to be considered as having in truth been *vera domina*, and equally, as in the case of a claimant *jure sanguinis* in fee simple, entitled to insist that the years of her minority should be deducted from the period of the positive prescription, pleaded as establishing a title that excluded her claim. At that time the majority of the Court adopted this doctrine; but I do not recollect of having so much as heard in any part of the deliberation, the plea once stated, that any one substitute of entail, however remote, might insist to have his minority deducted from the positive prescription, excluding the entail, or the still more novel plea, That in a question concerning the positive prescription, every substitute, though he may insist for deduction of his own minority, cannot insist for deduction of the minority of those who were nearer the succession than himself, and to whom the benefit of a successful challenge might have been even immediate and direct; so that, according to this doctrine, an entail shall be complete and incomplete at one and the same time,—shall be excluded *quoad* one class of substitutes, and effectual *quoad* another class of them. These doctrines are not light matters in the law of Scotland. Had they formerly met with countenance from

any of your Lordships, I don't think they would have escaped my memory, nor been overlooked in the Cases lodged in the appeal taken against the judgment of this Court; but now that they have been mentioned to us as matters deemed of very serious consideration by great and respectable authority, I thought it my duty to examine them with attention, and having done so, I am bound, with due deference, to say that they appear to me adverse to the established principles of our law, and tending directly to involve entailed property in an inextricable labyrinth of confusion and uncertainty.

With respect to the peculiar rights of the nearest substitute, I shall say nothing in addition to what I stated in December 1796. It then appeared to me sufficient to state, in support of my opinion, that as, in the general case, irritancies may be purged, of course declarators of contravention do not necessarily and immediately resolve the right of the contravener; but, in the first place, only operate as a powerful compulsitor, in order to make him rectify wherein he had violated the restraints of the entail; for I thought it followed of necessity from this known doctrine of law, that an action of contravention was *sua natura* different from a claim of property, and was precisely of the same nature, whether brought by the nearest or most remote substitute. A claim of property is a simple *vindicatio domini*, an assertion of absolute right already fully in the claimant; and if well founded, not to be defeated by any thing the defender can do after the commencement of the action,—*pendente lite nihil innovandam*; whereas the action of contravention is founded on a *jus obligationis* of the defender, the proprietor, to fulfil the conditions on which he holds his estate, in which every substitute is equally a creditor: and though, in case of the nearest substitute, it involves a claim to the estate, still that claim is liable to be disappointed *pendente processu*, by the defender purging the contravention, and is, therefore, at any rate, only a contingent *modus acquirendi domini*, not *vindicandi*. This argument therefore proved, that as it was then allowed that the minorities of the remoter substitutes did not suspend the positive prescription, so neither could that of the nearest.

It is plain, however, that this argument does not conclude, where it is contended, that the minorities of remoter substitutes are to be deducted from the positive prescription. This doctrine, therefore, remains to be considered; and I understand that it proceeds on the notion, that as every substitute has a separate and independent interest in the entail, which he is entitled to maintain by the action of contravention, of course when prescription is pleaded in bar of that action, he may deduct his own minority, but no other.

But this argument, I apprehend, proceeds on confounding the characters of the positive with those of the negative prescription, and involves also a mistake as to the true nature of the action of contravention.

In the *first* place, The positive prescription does not operate against the title to pursue of the claimant, but only in establishing the title of property of the person in possession; nor does the validity of the one imply the invalidity of the other: *jus sanguinis* cannot be abandoned or lost *non utendo*; the vicennial prescription only renders the verdict of propinquity in a retour a *res judicata*. Accordingly it is a general rule of law, that *jus sanguinis* suffers no prescription. The title to pursue for the estates of our ancestors is

accordingly perpetual, and not to be lost, like a *jus obligationis*, by forty years neglect; and the validity of the positive prescription, as a title of property, depends on the nature of the possession of the defender, not on extinguishing the right of action in the claimant. Possession for forty years by the defender, or his authore, undisturbed by the claimant and his predecessors, following on title-deeds *ex facie* unexceptionable, affords *presumptione juris et de jure* a valid right to the estate claimed, and of consequence a sufficient defence on the merits, like an onerous purchase, or any other ground of right, but creates no impeachment of the claimant's *jus actionis* or title to pursue. The deduction of minority, therefore, in the positive prescription, arises, not from saving the claimant's right of action, but from the imperfection it occasions in the presumption which creates the prescriptive right to the estate. It is evident, that the presumption arising from long undisturbed possession, of the right having been originally good, is much weakened, if it appears that the person or persons who, according to the statement of fact given by a claimant, were the *vera domini*, had been minors during part of the forty years, so that the undisturbed possession of the defender might, with reason, be in some degree ascribed to the inattention of minors to their interest, and to the peculiar inconveniences attending the carrying on of law-suits at that period of life. Hence it is, that in the deduction of minority from the term of the positive prescription, a consequence has invariably taken place, clearly incompatible with the plea of the pursuer now under consideration, viz. that the deductions of the minorities of the whole *veri domini* in succession has constantly been allowed, whether the claimant represents them or not, or inherits through them or not. An uncle, on the death of a nephew by an elder brother, serves heir to his own father, or a more remote ancestor, and then brings his challenge, and is met by a prescriptive title; but he deducts the minority of his deceased nephew, and of his deceased elder brother, as well as those of his own father, or others whom he represents. I need not quote to your Lordships the cases of Campbell of Ottar, Maclean of Broless, and numberless others, where this practice was followed. The deceased *veri domini* often lived in poverty, and it was not safe to represent them. But it never was questioned, that if a claimant was at all entitled to deduct minority from the positive prescription set up against him, he was entitled to this deduction on account of the minority of every *verus dominus*, who, according to the evidence, was a person that, in his own time, had the true right to the estate, and that equally whether the claimant represented such *veri domini* or not, or inherited his right of blood through them or not. In short, it was a *vitium* in the right of the defender, that he detected and excepted against, in the same manner as he might take exception on account of any irregularity in the form of the title set up as the ground of the prescriptive possession, or because the defender, or his predecessors who enjoyed the possession, were incapable of legal possession, as being aliens or traitors, &c. It seems to me, therefore, manifestly impossible, that any person entitled to insist for deduction of the years of his own minority from the term of the positive prescription, shall not be also entitled to insist for a similar deduction on account of minorities that occurred before his right accrued to him, or even before his birth. If there is a *vitium* in the defender's plea of un-

disturbed possession on account of the claimant's own minority, is not there a like *vitium* on account of the minority of the claimant's predecessors, whether he represents them or not, and must be entitled to allege this *vitium*, like any other defect in the title opposed to him? This at least is certain, that so the law has been held to stand, whenever minority was objected to the positive prescription; so that if the deduction of it is to be allowed from respect to usage, the principle of that deduction is entitled to similar treatment. I think myself, therefore, authorized to conclude, that the doctrine of each substitute deducting his own minority, but no other, is adverse to the principle on which that deduction has been hitherto allowed in the positive prescription. Besides, it certainly may concern the interest of a remote substitute to deduct minorities of earlier or nearer substitutes from a prescription excluding the entail; and if his own *jus actionis* in minority is sufficient to create a *vitium* in the undisturbed possession of the defender, why should not the *jus actionis* of preceding minor substitutes, whose activity would have preserved him the estate, be pleadable by him as a similar *vitium*?

I may here, by the by, observe, that it was on the above known rule of deduction of minority that I formerly held the case of Ayton of Kinaldy as a great authority for the doctrine, that the minorities of no substitutes, not even the nearest, can be pleaded as a *vitium* in the positive prescription. There Thomas Ayton, the claimant, attempted to plead on the minority of his nephew David, the nearest substitute, as creating a *vitium* in the prescriptive possession founded on by the defender; but James Monypenny denied that this could impeach his prescriptive right of property under the investiture 1700; and the House of Lords, *inter alia*, directed this defence on prescription to be sustained. No doubt, Thomas was, during the same period, major; but however this might operate by means of the negative prescription, against his own title to pursue as a substitute, which is certainly a very nice question, it plainly never could validate the defence of Monypenny on the positive prescription.

But in the second place, The object of the statute 1685, is to preserve estates agreeably to the will of the donor; and the contrivance adopted for the purpose is, not to split the fee among the institute and substitutes, and leave to every one to take care of his own portion of the fee; it is, on the contrary, to vest the whole fee in the heir in possession of the estate, and to entitle the whole substitutes to compel him to use it agreeable to the conditions prescribed by the donor, or else to part with it to the nearest substitute. The object, therefore, of the *jus actionis* of every substitute, is not merely to guard his own immediate interest, but to insist for obedience to the whole will of the donor, so far as signified in the manner directed by the statute. This action, therefore, is calculated to preserve the entail as an *unum quid*; and its distribution among members like an *actio popularis* sufficiently enables it to produce its effect without any privilege in favour of minor substitutes against the act 1617, while, at the same time, it does not involve even a contingent claim of property, (unless when the nearest substitute is pursuer), so as to afford any claim on principle to such a privilege. It appears to me, therefore, not only to form a very violent stretch (nowise called for by either law or expediency) of the doctrine of deducting minorities from the positive prescription, to attribute such an effect

to the *jus actionis* competent to all substitutes of entail; but to amount to a demolition of the system of the law relative to entails, to adopt it as a rule that, in a question with certain substitutes, a contravention of the will of the donor, destructive of the entail, may be effectual, and with others may be challengeable. It surely would be nowise desirable or agreeable to the intendment of the statute 1617, that so feeble an interest as that of a minor-substitute, the fiftieth, perhaps the hundredth in degree, should be sufficient to shake the security destined by that *palladium* of Scottish property; and for my own part, I cannot form a conjecture how the questions could be extricated, which must arise, if the action of contravention can be held competent to remote substitutes, though near ones stand excluded by the positive prescription.

Dec. 13,
1695.
Fountain-
hall.

It is impossible to do justice to these topics within the limits of discussion which a Member of this Court can, with any propriety, occupy. Your Lordships know that it was distinctly found in the case of Innes of Auchluncart, that a right of action was preserved from the negative prescription, while, at the same time, the term of the positive prescription was also found to have been running, which afforded an invincible defence against that right of action; and as to consequences, only put the case, that the pursuer had been major at her father's death, that the present action had been brought by Miss Mackay, and that she had been successful in pleading the pursuer's doctrines, I ask, would your Lordships have given the estate to Miss Mackay, to Mrs Fullerton, or to Sir Hew Dalrymple and his children? Could you give it to Miss Mackay, when Mrs Fullerton had done nothing to forfeit? Could you give it to Mrs Fullerton, while Sir Hew stood secured by prescription against her? And could you give it to Sir Hew, while Miss Mackay had got a declarator of contravention, forfeiting him and his issue? Or, suppose the pursuer to succeed in her present suit, and she and Miss Mackay not to leave issue, would the estate, at their decease, return to Sir Hew Dalrymple and his children, under the inversion of the succession in the charter 1742, secured by prescription against the other substitutes? Or what would become of it? Would the pursuer's action operate in favour of all posterior substitutes, though her minority could not? Or would its effect be confined to her own interest, and leave every other person *in statu quo*?

I am therefore for sustaining the exclusive title of property produced by the defender, and finding articulately, that the pursuer's title to pursue involves no quality tending to impeach the validity of that exclusive title.

LORD SWINTON.—We ought to find that Sir Hew Dalrymple did not contravene; and, at any rate, that if there was a contravention, it may be, or has already been purged.

What I had to say has been anticipated by my brother who has now spoken.

Quotes the former Interlocutors of the Court of Session, which were appealed from.—These interlocutors, it was said, in the House of Lords, had proceeded on an assumption of law, which we had no title to make; and now, in consequence of their remit, we are to decide the point which was formerly assumed.

In a question of construction of this kind, we should keep in mind, *non solum verba legis tenere, sed vim et potestatem.*

Quotes the Clauses of the Entail of Bargany, containing the prohibitions relative to the order of Succession.—Wherein did Sir Hew Dalrymple alter, innovate, or change the order or course of the succession?—He is said to have done so by the deed of repudiation.—*Reads the material clauses of the deed.* Here in effect he says no more than this—"I delay taking up the succession to the estate; there is no provision in the entail, nor any rule of law, which can oblige me to take it up immediately; I only mean to lie by, and for a time; and in doing so, I hurt nobody."

What says the act 1685? (*Reads the clause relative to frustrating the course of succession.*) But whose succession did Sir Hew frustrate? Was it Mrs Fullarton's? This is not even pretended; she certainly stands where she did before. Did it frustrate Mr Hamilton's? He could not say so; for his succession was, on the contrary, brought forward, as was that also of Dr Robert Dalrymple, the third brother.

If, in place of this, the brothers had made an agreement, that Sir Hew should take up both estates, and should give to his brother, Mr Hamilton, a lease of one of them for a mere pepper-corn, it would have been equivalent to what really was done: or, with the same effect, they might have stipulated, that if Mr Hamilton was ever disturbed by Sir Hew in drawing the rents of the estate of Bargany, he should then bring an action of irritancy against him, under the entail of North-Berwick.

It is clear that Sir Hew did no harm to any one. He *frustrated* the succession of nobody, and by that word I explain the other words, *innovate* and *alter*. It may now be said, that it is the pursuer alone who is attempting to alter the will of the entailor, and to frustrate the succession.

Thus it appears, that the assumption in our former judgment was not well-founded.

LORD ARMADALE.—The only question formerly considered by this Court was, Whether Mrs Fullerton's minority ought to be deducted from the positive prescription pleaded by the defender upon his charter and infestment 1742, as a title sufficient to exclude the pursuer's pretensions and claim to the estate of Bargany?

Upon that question this Court found, "That in this case, in computing the period of prescription, the years of the pursuer's minority are to be deducted, and that the defender had not produced a sufficient title to exclude."

That judgment having been carried by Appeal to the House of Lords, the Judges in that Court have taken a more enlarged view of the case than had occurred, or perhaps had been pleaded, to your Lordships. The question of prescription, even upon the *data* assumed by your Lordships, appears to have been attended with difficulties. It seems also to have been questioned, whether your Lordships ought to have taken for granted certain conclusions in law essential to be held as true by the pursuer for founding her plea, and the judgment of the Court thereon; and, independently of the plea of prescription, further difficulties appear to have arisen in the minds of the Judges there, in regard to the merits of the pursuer's claim, in competition with the right and title of the defender.

The House of Lords pronounced a judgment highly becoming

and proper in the view of the case which they seem to have entertained; and with these difficulties before them, they neither reversed nor affirmed, but remitted to your Lordships to review the interlocutors you had pronounced, to consider how far the rights of the contending parties were involved, and to pronounce such judgment, for or against the pursuer's title, as, upon farther consideration, it should seem to deserve.

I do not enter upon any critical discussion of the words of the remit; I take the broad import of it to be what I have now stated; and unquestionably, as there is no affirmance or reversal of any part of the judgment, it is entire, and proper, and necessary, that the case now sent to be reviewed should undergo the most enlarged and extensive discussion that is consistent with, and admissible by the forms of proceeding in such a process, to which, I presume, the Supreme Court of this kingdom will ever pay respect.

The form of the pursuer's action is a summons of reduction at her instance, subsuming certain facts as true, which, *in hoc statu*, she is entitled to do. It also draws certain conclusions in law from these facts; and upon these self-assumed grounds in law and in fact, it calls for production and reduction of certain writings, which she specifies, and farther, of all other dispositions, charters, &c. anywise affecting or relating to the lands and estate of Bargany; and it finally concludes, that she should be found and declared to have right to the property of said estate. Against this general and extensive demand, Mr Hamilton of Bargany, and now the present defender, Sir Hew Dalrymple, have produced to exclude, as a preferable, unchallengeable, and exclusive title to the estate of Bargany, in opposition to any thing that the pursuer has alleged in fact, or is *entitled* to assume in law, a charter and infestment upon that estate in 1742; and having possessed that estate upon this title for upwards of 40 years, the period of the positive prescription, he maintains that he is the legal proprietor thereof.

With regard to the form of this defence, although, from the writings that appear, some of them upon record, and others produced by the parties, your Lordships may possibly have all the material lights in the shape that you would have had if the production called for in the summons had been satisfied; and although it may perhaps be of little consequence to the parties in this cause, whether the decision shall proceed upon the preliminary defence to exclude, or upon the secondary form by a production satisfied; yet it appears to me to be of essential consequence to the landed property of Scotland, (one great object of the law of the country,) that that form, viz. a title and right to exclude in a process of reduction-improbation, should be preserved entire; that a general production of a proprietor's whole title-deeds, of his charter-chest, (as it is termed,) or a decree of certification *contra non producta*, should not be required or allowed, wherever a defender can at once show a preferable and exclusive right in competition with any party laying claim to an estate which he possesses.

Formerly, in a process of reduction and improbation, every writing behoved to be specially called for; and the certification of forgery could be pronounced against no writing but that against which there was a special reason of reduction libelled. Now, however, that the most general and even fictitious reasons of reduction are libelled,

for the mere purpose of compelling a general production of writings, no otherwise specified than that they are relative to, or affecting the estate or subject in question; the practice has become general, and is established, and the propriety, even necessity of it is obvious, that a defender may select and produce, *in limine*, what he conceives to be a preferable title sufficient to exclude; and if your Lordships in any case think so, there is an end to the question, and of all further production.

A title to exclude may be of different kinds, and the same title may have different qualities, tending to exclude the pursuer's action and claim. It may be a mere title of prescription, which, followed with 40 years possession, does, in terms of the act 1617, constitute a prescriptive right; but the same title may, independently of prescription, carry with it a preferable and exclusive right to the property which the pursuer claims.

It is in this twofold view that this case presents itself to my consideration. And although the question of prescription, is one which, if founded, would supersede the consideration of the other, and therefore might perhaps first be considered; yet, in viewing this case, and delivering my opinion thereon, I deem it more proper to consider, in the *first* place, the title of the pursuer in competition with the right in the defender, independently of prescription, because I think that the merits of these two rights, when considered in that shape, throw considerable light upon the question of prescription, and if held by your Lordships in the manner that I do, may perhaps relieve you from the difficulties which you had upon the question of prescription, as formerly determined.

The pursuer's general assertion is, that she is the nearest substitute under the tailzie of Bargany, and upon whom that estate has now devolved. And, in order to support and instruct that assertion, she contends, that the late Sir Hew Dalrymple of North Berwick, committed certain irritancies of the estate of Bargany, and under the tailzie thereof, by which he forfeited that estate for himself and for his heirs; and, of course, that the present Sir Hew, and the eight substitute heirs of his body, being set aside, she is now the proprietor.

The points which arise out of that general question are various, they enter deeply into the feudal principles and practice of the law of Scotland, and require to be separately considered.

The *first* point is, Whether the late Sir Hew Dalrymple was in a capacity and situation, in regard to the estate of Bargany, that he could commit an irritancy by any thing which he actually did regarding it? A *second* point is, Whether what Sir Hew Dalrymple did amounted to an irritancy? A *third* point is, Whether, if irritancies were committed, they were of a purgeable nature? And a *fourth* point is, Supposing that Sir Hew could contravene, and did contravene, whether the contravention operated *ipso jure*, or if it can now be declared after his death?

The first of these points is, perhaps, attended with some difficulty; I proceed to examine it in this manner. It is an acknowledged fact, that Sir Hew made up an active title to Bargany that connected him inseparably with that estate, or which vested that estate in him as an heir of tailzie; it is likewise acknowledged, that this tailzie does not contain an usual, and, I apprehend, a very useful clause for the preservation of tailzied succession, a clause obliging the

heirs of tailzie to make up titles under it, within a limited time, or cutting off the right of any apparent heir omitting to do so within a given time. On the other hand, I think it is sufficiently proved, that Sir Hew Dalrymple did enter into possession of the estate of Bargany, and that he possessed as *apparent heir* of tailzie.

But although an apparent heir has, by the law of Scotland, a title to possess, and has other privileges annexed to his mere right of apparenacy without any further connection with the estate; and although it is likewise true, that certain legal effects do arise from his possession, namely, of accounting to creditors and third parties, and even, in some cases, being subjected to an universal passive title; yet the question remains behind, and is a different question altogether, whether it is one of the legal effects of an apparent heir's possession to *oblige* him to make up titles, or in the event of his not doing so, to hold, *de jure*, that he had made up titles, to the effect of fulfilling, and also of contravening, by counteracting the conditions of a gratuitous deed of tailzie.

Many estates in Scotland have been possessed by apparent heirs, and by one apparent heir after another. The debts and deeds of an apparent heir do not, by the common law of Scotland, attach upon an estate to which he had not at the time entered by service, or does not thereafter serve. The estate remains in *hereditate jacente* of his ancestor who died infest; and with regard to an apparent heir of tailzie, as he cannot do any effectual deed to destroy or injure the tailzied estate; so he cannot derive any effectual benefit from the provisions and conditions in favour of the heirs of tailzie. If he die in apparenacy, his wife has no benefit—his children have no benefit—his creditors take nothing; and the next heir of tailzie will serve as if he had never existed.

It was to restrain frauds against creditors, and to regulate the effects of an apparent heir's possession, that a statute was necessary, viz. the act 1695, to bring the debts and deeds of an apparent heir, who had possessed for a certain time, (three years) against the estate; and the same statute declares, that an apparent heir possessing or acquiring debts otherwise than at a public sale, shall be liable for the debts and deeds of his predecessor.

But even in the case of apparent heirs of line coming under the description of the statute, the obligation upon the apparent heir so possessing, has not been extended to the gratuitous debts of the ancestor, as has been found in different cases. And with regard to apparent heirs of tailzie, it has been expressly found, that the act 1695 did not at all apply to them.

Case of
Græme of
Hourston,
May 13,
1795.

The words of the tailzie-act 1685, establishing the obligation upon heirs of tailzie, enacting, that it shall not be lawful to them to sell, annailzie, or dispoise, and declaring all such deeds null and void, must have had in view singly *those* heirs, the proprietors of, and connected with the tailzied estate, "who could sell, annailzie, and "dispoise," &c. as the act recites. It does not in terms, it could not, in the spirit of the act, or consistently with the principles of the law of Scotland, be extended to substitute heirs not served, and who might never have any connection with the estate; and therefore, upon this point, I am inclined to hold, that Sir Hew Dalrymple not having connected himself by service or other feudal title, with the estate of Bargany, and there being no clause in this tailzie

requiring him to do so in a given time, that he was not in a capacity, in regard to this estate, that he had not acquired that active legal or necessary relation to this estate, by which he could incur a forfeiture of it. The deed granted by him to John Hamilton of Bargany, whether considered as a deed of conveyance, or of renunciation, was a null and void deed, *a non habente*.

If right in this, there is an end to the pursuer's plea, of Sir Hew having forfeited for himself and children. But as that is only one of the points, and may strike your Lordships differently, the next point is, Whether, supposing Sir Hew was in a capacity to irritate and contravene the tailzie of Bargany, did he actually commit any irritancy?

Three things alleged as Irritancies or Contraventions of the Tailzie of Bargany.

1^{mo}. That Sir Hew Dalrymple acquired debts, upon which a part of the estate was carried off.

2^{do}. That he executed a certain deed, in consequence of which his brother, John Hamilton of Bargany, took up the estate.

3^{tio}. That he assumed, and afterwards laid down, the name and arms of Hamilton of Bargany.

With regard to the first of these alleged contraventions, a most satisfying answer is made *in fact*, pages 75 and 76 of Memorial for the defender, to which I merely refer, as it consists of a statement of sums, dates and transactions, which I think must be convincing to your Lordships upon this head.

With regard to the second alleged irritancy, viz. The deed granted to John Hamilton of Bargany, the single question to be considered is, What the legal import and construction of that deed is, according to the practice and forms of the law of Scotland? I cast aside many of the criticisms that I have heard made upon it on both sides, and I put it to this legal and fair test for my mind, namely, Would John Hamilton of Bargany, holding this deed, and construing it as a deed of disposition, or a deed of obligation to dispoise, (which is the pursuer's plea and construction of it), have been entitled to bring an action against his brother, Sir Hew, to compel him to make up titles to validate this alleged disposition, or to adjudge in implement upon a charge to enter heir? I apprehend clearly, that he would not have been so entitled, and that Sir Hew would have been founded in this good defence:—I have neither entered, nor do I mean to enter heir, nor will I allow you to maintain any process to the effect of compelling me to do so. I have merely repudiated the succession; take it as you can and may, but not through me,—not under any express or implied title created in me. This I take to be the plain import,—the rational construction, and the legal substance of this deed, which no conveyancer versant in the law of Scotland can denominate a disposition of lands in the circumstances of the case.

In regard to Sir Hew's assuming, and then laying down the name and arms, there is nothing in it. When he resolved to renounce, it was just what he ought to have done, and fell to do; and, as a man, by renouncing after mere possession, or not taking a succession, does not contravene, there was no contravention in what he did.

According, then, to the view in which this matter occurs to me,

the question, how far these contraventions, had they been incurred, would have been purgeable by Sir Hew, if any challenge had been brought; and whether they could now be declared after his death, are entirely superseded? But upon these points I have still less difficulty in expressing my opinion, founded, as I conceive, upon the established principles of law and practice in similar cases, that such contraventions as these here alleged were purgeable; and I do not think, that, as contraventions, they could be declared after Sir Hew's death.

That such contraventions are purgeable, and have been allowed in similar cases to be purged, is certain. All contraventions which *de facto* can be purged, may be so before declarator. Cases of Ross Munro, Hamilton Gordon of Halcraig, and of Price *contra* Hamilton of Raploch, all in point.

It is founded in justice, and in the principles of the law of Scotland, that a man should be allowed to do away, if he can, in due time, those acts from which forfeiture is inferred;—and it arises also from the nature of a tailzied fee, and from the manner in which an heir or substitute having an interest to establish a contravention, must proceed in establishing it. For, if there is a point incontrovertible in the law of Scotland, it is this, that there is no such thing as *ipso jure* irritancies or forfeitures, in regard to feudal rights and infestments in lands. There is no such thing as an *ipso jure* extinction, *confusioque*, of rights constituted by infestment, even where there is no irritancy in the case: And where a tailzied fee is completed by infestment, as it ought, nothing less than a decree of declarator of contravention can resolve the right of the heir of entail. Lord Stair says expressly, “that there must be declarators before “the tailzied infestment can be annulled or resolved.” So strongly founded is this, that, in the case of tenants, also in the case of feuars, there must be a decree of declarator of irritancy, before the lease of a tenant, or the feu of a vassal, can be annulled, *ob non solutum canonem*. Case of Ballantine against the Duke of Argyle.

In the case of tailzies, the Act 1685 clearly points out, that where a contravention is incurred, and where that is to become the ground of a forfeiture of the heir contravening, a declarator must be pursued. The words are: “The next heir of tailzie may immediately, “upon contravention, pursue declarators thereof, and serve himself “heir to him that died last infest, and did not contravene.” Until a decree of declarator of contravention is obtained, the heir in possession remains proprietor of the estate, and may exercise every act consistent with the conditions of the tailzie.

On the other hand, as all irritancies, which *de facto* can be purged, have been, and always are allowed to be so, before a decree of declarator; and, as a declarator of contravention is indispensably necessary, to forfeit and annul the right of the heir contravening, the next question is, and a very general one it is, Whether a declarator of contravention can, or ought to be allowed to proceed after the death of the person contravening?

I am humbly of opinion, that a declarator of contravention under a tailzie cannot, and ought not to be sustained after the death of the contravener. My reasons are,

1st, The presumption of law and of reason is, That an heir apparently contravening has had the latent warrant of the entailer, (of

which there is a very remarkable instance in this case), or the consent of the heirs of entail, to do that which is founded on as a contravention. He may have had other defences sufficient to relieve from, or to justify what he has done. He may have had a back-bond from, or other stipulation with those whose contracts are founded on as contraventions, by producing which he could at once have put an end to the pretended act of contravention.

2dly, As a declarator of contravention is a penal action, drawing with it the forfeiture of the whole substance a man may have in this world, with beggary to himself, and ruin to his heirs and family, who may be consequentially stripped of every thing that they have relied on; it would be unjust that such trial should be held, or punishment inflicted, after the death of the guilty person. Nor is it necessary, for the safety or security of the other heirs of tailzie, nor for the will of the entailer, that a contravention should be declared after the death of the contravener; because the deeds of the contravener may thereafter be annulled;—and, when the ends of justice may thus be attained, and the estate of the entailer preserved entire, without declaring a forfeiture against one who is dead, and when he can no longer defend his own acts, it seems as unnecessary in itself, as it is contrary to every principle of law and of justice, to permit an action of declarator of contravention to proceed after the death of the contravener.

3dly, No instance can be pointed out upon record, before or since the act 1685, upon common law, or upon the enactments of that statute with regard to tailzies, in which an irritancy was declared, or attempted to be declared, after the death of the contravener. By the ancient common law of Scotland, an heir of tailzie contravening, forfeited not only for himself, but for the descendants of his body; and that too, without an express clause forfeiting the right of the descendants in the deed of tailzie. Such was the rigour of the ancient law; and it must be obvious, that while such was the law, remote heirs of tailzie had a manifest and strong interest to declare irritancies after the death of the contravener, if a declarator of contravention after death had been competent. But no heir of tailzie has been found so hardy; no practitioner so wild; nor is there any instance to be traced in our law books or decisions, of an attempt made to declare a contravention after the death of the contravener. What appears in the printed case of Gordon of Park against his Majesty's Advocate, as the able argument of counsel on both sides, and the judgment of the Court, so far as it went, is diametrically adverse to the idea of contravention after death; and I trust, that no such plea will ever, for a moment, be listened to in this Court.

It is, perhaps, of less consequence to inquire, or at least to decide, whether a declarator of contravention could now be pursued against the late Sir Hew Dalrymple, if any irritancies had been committed by him; because the fact is, that whatever Sir Hew may have done, or whatever his brother John Hamilton of Bargany may have done, every thing, by the hand of time, and before any declarator of contravention obtained, has been wrought off, and brought into the precise situation in which it ought to be, without the slightest particle of injury or loss of any kind to the pursuer; and, I apprehend, it is a solid and unanswerable plea, "That where there has

“ been no violation in effect committed against the will of the entail, and no injury done to the substitute-heir, there is no interest, and there can be no right or foundation in law, for pursuing a declarator of contravention.

Put the case of a tailzie prohibiting leases beyond nineteen years, or any other period. An heir of tailzie grants a lease for a longer period, and thereby is liable to have an irritancy declared against him, and his estate forfeited; but, before a declarator of irritancy and contravention is brought by a substitute heir of tailzie, the period of the lease is run out: would any of your Lordships hesitate, for a moment, to dismiss such declarator of contravention?—Put a similar case: A tailzie prohibits all liferent-securities to the wife of the heir of tailzie beyond a certain sum, or a certain proportion of the rents of the estate; an heir of tailzie counteracts that prohibition, by granting a liferent-infestment to his wife to a greater amount: But, before a declarator of contravention is brought upon this act, which appears on the public record, the wife is dead; but the substitute heir of tailzie nevertheless insists that the granter of this infestment has forfeited his estate:—What lawyer could maintain such a plea? or, would a Judge of the law of Scotland entertain it as a matter of consideration, if it could be pleaded? I conclude, therefore, that the principle is sound and just, and which, in itself, is a full defence against this action, that as there has been no violation in effect committed against the will of the entail, and no injury done to the substitute heirs of tailzie, there is no just interest in them, and there can be no right or foundation in law for pursuing a declarator of contravention in these circumstances.

The only thing which, upon the first view of it, seemed to be attended with a good deal of difficulty in my mind, was, whether the title which Mr Hamilton of Bargany did expedite, by service in 1742, was altogether regular and unexceptionable in itself, independent of prescription, when, in fact, his elder brother and nearer heir was in existence. But I think there is a solid answer to this, when pleaded by the pursuer. A substitute heir of entail is entitled to maintain every action that is necessary for preserving the entail; and, if the heir of entail in possession omits any of the provisions or clauses in the entail, he is entitled to insist that these shall be inserted. But I do not conceive that his right goes one step farther;—he is not the proprietor of the estate; he is not entitled to regulate or controul the heir, as to the mode of making up titles, further than that the tailzie shall not be omitted. We see very often the difficulties that occur, and the questions that arise as to the proper mode of completing titles, where a progress is long and involved, and formal titles not regularly made up.

But an heir of tailzie has no further interest or right to inquire into the title made up by the heir of tailzie, than that the conditions of the tailzie be inserted in that title, whatever it is. Was it ever heard of, that a substitute heir could say to the heir in possession, that he ought to have made up his title by a special service, or by a general service, or by an adjudication in implement, or by taking infestment upon an unexecuted precept in the disposition of tailzie? If there was any error, therefore, in the nature of the title made up by John Hamilton of Bargany, which I am not prepared to say there

was, I do not think it could avail the pursuer, as a ground for declaring an irritancy; and it is also wiped off by prescription.

The chief impropriety committed in the charter 1742, was to the prejudice of this defender and his children, by calling in the heirs of the body of John Hamilton of Bargany, in preference to the defender and his children, whose rights were entire. But, by the death of John Hamilton of Bargany, without children, there is an end of that; and the estate now stands, as it would and ought, without the least injury to the pursuer, or to any of the other substitutes in this tailzie. There has been no violation in effect, and no injury now exists that can be the foundation of a declarator of irritancy.

If the opinion which I have now given is well founded in any one of the various points which I have considered, the conclusion to be drawn is twofold:

1st, That the defender has a preferable right under the titles produced by him, independently of prescription, sufficient to exclude the pursuer's claim; and,

2^{dly}, That she is not, and cannot prove herself to be, the first substitute under this entail.

And having detained your Lordships so long, I shall say but a single word upon the point of prescription, and that for two reasons.

In the *first* place, If the pursuer ever was, or could now show herself to be the first substitute, I do most implicitly and fully assent to every word of the opinions delivered upon the former question (when I did not sit here), I mean the opinions of Lord President, Lord Justice-Clerk M^cQueen, and Lord Meadowbank.

From the first time I could distinguish the merits of such a question, I had learned, and held upon the authority of different decisions, and more particularly from the deliberate and full opinions of this Court in the case of Gordon of Whitley, that, admitting minority to be a deduction from the positive prescription, it was not the minority of a substitute, first or last, or of any or all the substitutes in a tailzie, that could interrupt; that it is the minority of that person, and of that person only, who can show that he is the *verus dominus* in competition with the *non dominus*, whom the prescription would otherwise support; that this is the exception which the statute admits; that this is the only exception which the principle of the positive prescription allows. And in addition to what I see stated in these opinions, and do adopt as the grounds of mine upon this point, I shall just make a single observation, illustrative of the principle, and demonstrating, in my opinion, the very singular effects which would result from allowing those who are mere substitutes in deeds of tailzie to plead their minorities.

The shape in which cases of this kind generally occur, exhibit but a very imperfect view, both of the principles and of the consequences attendant upon the plea of minority in substitute heirs of a tailzie being sustained. Thus, it generally happens, that the substitute who has minority to plead in his favour, brings an action against the heir who has been acquiring by prescription contrary to the tailzie; and he insists that either his own minority, or the minority of some other substitutes, shall be deducted from the period of prescription, in order to show, that when such deduction is made, the positive prescription has not run in favour of the party pleading it.

But let us suppose the shape of the action reversed, that the proprietor of an estate which had been under the fetters of an entail, has possessed it upon unlimited titles for upwards of forty years, and having thus acquired an absolute right to the estate in terms of the act 1617, he, to render the matter more clear, brings an action of declarator of property before your Lordships, against all and each of the heirs of tailzie called under the prescribed deed of tailzie, concluding to have it found and declared, that he was the unlimited proprietor of the estate; that the heirs of tailzie, if they had any thing to say against that plea, should come forward with it; and that it should be found and declared upon the prescriptive right produced, that the tailzie was at an end, and that the estate was his without limitation or restraint of any kind. Accordingly, a numerous set of heirs of tailzie come forward, some of them majors during the whole course of prescription, others minors during the whole course of prescription, some of them in minority during a part, and in majority during the remainder of the years of prescription, some of them who had no existence during the prescription, and others who had come into existence at the last moment of prescription. According to the pursuer's plea, that the minority of substitute heirs interrupts, it would lead to the grossest absurdity—to a situation unparalleled in the most whimsical conception of tailzies.

The pursuer of the declarator would prevail in having it found, that he was free from the fetters of entail as to those who had not minority to plead; but it would be found, that he was subject to the fetters of the tailzie in regard to those who were minors; in short, that it was both a tailzied and untailzied fee at the same time, and in the same person; a situation incompatible with the law of tailzies, absurd in itself, and consequential of the doctrine that is pleaded by the pursuer.

But, in the *second* place, Whatever difficulty or difference in opinion may have occurred formerly, there is an end of that. When the *data* the pursuer assumed, and behoved to assume, are probed to the bottom, they are found to be untrue; when her title and character as first substitute are investigated, it appears to me demonstratively not to exist: She is not at this moment the *first*, but the *ninth* substitute.

On the whole I conclude, that the defender has produced both a preferable and a prescriptive right, sufficient to exclude the claim of the pursuer, and that in my opinion your Lordships ought to find accordingly.

LORD ESKGROVE.—In some points I must differ from what has been advanced by some of my brethren. Some things have been said which would go to destroy the principle of our former interlocutor.

In that interlocutor we went upon the ground of an hypothesis, that the pursuer was the first substitute. In the shape of the cause at that time, the pursuer not being allowed to go into the declaratory conclusions of her libel, I still think she was entitled to that assumption.—This was not understood above.—It was the necessary consequence of the nature of the pursuer's plea, and of having her *declarator* stopt until the issue of the question of prescrip-

tion. However, I greatly applaud the attention of the Honourable House, and agree in the propriety of what they have done. Observing that the essence of the pursuer's plea was merely an assumption, they have corrected our error of not going first into the declaratory conclusions, before determining the point of the exclusive title. They have not ordered the production to be satisfied, reserving objections to the pursuer's title;—they have not gone so far;—but in effect, they have directed us to go into the consideration of the declaratory conclusions. It is remitted to us then, to reconsider our former opinion, and whether the exclusive title is good or not.

I hold, and ever have held, that the minority of every substitute saves from the effect of prescription *quoad* his own individual right and interest. But I also held, that your Lordships had determined the contrary. However, I considered that the first substitute in an entail had some more substantial right than the others. I am still of opinion, that by the very words of the act of Parliament we are expressly bound to allow the minority of every person *against whom prescription is objected*. I find no distinction in the act.

It was another question of interpretation, Whether the exception in the act applied at all to the positive prescription? Your Lordships have long ago decided, that it applies to both positive and negative prescriptions. I should not have been sorry if the question had been differently decided; for I think it would have been more expedient to have excluded the exception of minority altogether from the positive prescription. I must, however, observe, that before any decision had ever been given by your Lordships, no doubt upon this point was ever insinuated in the pleadings in the case of *Mackerston*. Holding the exception as applicable to the positive prescription, I still think the words of the act so express, that, the decisions of this Court notwithstanding, the minority of every substitute ought to avail himself.

This leads to the consideration of the question *as affected by former decisions*.

1. *Case of Mackerston*.—The facts of this case are known. There was no reduction or declarator of irritancy on the footing of past contraventions. The action was, to ascertain which of two deeds was to regulate the succession. In the whole proceedings there is not a word of reduction, or of declarator of irritancy. The action would equally have lain, although there had been no irritant or resolute clauses in the entail. Here the *negative* prescription was a natural plea, as well as the *positive*. It was replied to this at first, that as both titles under the former investiture, and under the latent entail, coincided in the person of the heir in possession, no prescription could run against the latter. This was justly over-ruled. It was next pleaded, that the minority of the heir in possession had interrupted the prescription. This also was over-ruled. Then the minority of the substitutes was pleaded. To this the answer was, That during their minority, the right in the estate had never devolved upon them: That until the possession was diverted from the line of the entailed substitutions, they could not have laid claim to the property: That, therefore, during their minority, they had no title to bring an action, at least none to claim the estate. Certain it is, that in this case no irritancy was founded on, as giving a ground of action to those substitutes. Their plea was over-ruled;

but the judgment was carried by a casting vote; and the dispute was afterwards compromised without having been carried to appeal.

2. *Case of Kinaldy*.—I was myself of counsel in the cause. Here there were clauses irritant and resolute. The defence pleaded was prescription.—It was at first pleaded in reply, as in the case of Mackerston, that prescription could not begin to run against the entail until the line of actual possession split from that under the entail. This being over-ruled, minority was next pleaded. To this it was answered, that the person pleading minority had himself been of age during the years of prescription, and the minorities of other substitutes could not avail him.—*Quotes from the Appeal-case for the defender*.—But it was not here pleaded, that the pursuer's own minority would have been equally unavailing, or that his own minority was not available to every substitute, *against whom prescription was objected*. The judgment of your Lordships in this case, was not only no support to the case of Mackerston, but was directly contrary to it; and that of the House of Lords, reversing it, proceeded on the footing that a substitute might have pleaded his own minority, but that in this case the pursuer had been all along of age.

3. *Case of Whitley*, in 1784.—*Quotes from the report of the case in the Faculty Collection*.—Here there were no clauses irritant or resolute.—Your Lordships found the substitute not entitled to plead his minority.—Still I would doubt the decision, if there had been irritant or resolute clauses to found an action for evicting the estate from the contravening heir in possession.

4. *Case of Auchindachy* has been quoted, but is admitted not to apply.

Thus, neither the case of Mackerston nor that of Whitley ought to be considered as of force to alter the express enactment of the statute 1617. In this I am the more confident, from the opinion which appears to have been delivered by Lord Thurlow in the present case.—On these grounds, I think the plea of prescription would be obviated completely in this case.

But another question remains, How far a judgment over-ruling the defence of prescription would be of much benefit to the pursuer? If your Lordships are to go upon the ground of the pursuer being or not being a *first* substitute, it becomes necessary to inquire, whether an irritancy has actually been incurred, (as to which I coincide in opinion with what has been said by my brethren), and what the direct effects of that irritancy would have been.

As to the effect of an irritancy upon the question, I do not think it necessary that a decree of declarator must be obtained, to found the plea of minority. The right of challenge is founded on the entail, and the statute itself speaks of forfeiture *ipso facto*. It is idle to talk of minority being counted only from the date of a decree of declarator, for then the party has actually won his cause. But the point is not material in the circumstances of the present case; which leads us to consider,

Whether an irritancy has here been incurred, and what its effect on the interest of the pursuer?

And, first of all, Did Sir Hew Dalrymple so connect himself with the estate, as to become liable to the obligations imposed by the entail? He assumed the name and arms, and afterwards laid them aside; he possessed the rents, &c. I see the force of the argu-

ments founded on his conduct in these particulars. They would be strong circumstances, if the question was merely, Whether he acted as heir of tailzie? But I cannot think he had the character of heir of tailzie vested in him in that way, which would have enabled him to do what the entail had prohibited. He ought to have been served heir, and to have made up feudal titles, and then he would have become liable in the obligations of the entail, and an irritancy could have availed the next substitute. It was a *personal* entail; and your Lordships have decided, that when an entail is personal, it affects the claims of creditors, even although not recorded. Any act of Sir Hew's, therefore, could not have affected the estate. If he had done as his grandfather wanted, and had first *served*, I am clear that the subsequent acts, if amounting to a contravention, would have occasioned a forfeiture. In speaking of an heir of entail incurring an irritancy, the law means an heir vested in the estate. But Sir Hew did not put himself in a situation to forfeit, even although he had granted a disposition of the estate. As there was no clause which could have compelled him to enter, nothing could have been done to make such a deed effectual. He was not in a capacity to contravene.

But even if he had been *in titulo* to contravene, another question would remain: Did his acts amount to a contravention? If he had made up titles, a deed of repudiation, such as he executed, would have been of no effect. As it was, if he had merely repudiated, without saying that he did so in favour of a particular person, it would have been still more prudent for himself, but still it was no disposition.—It would be a very strange effect of an entail, to oblige a man to take under it. Not being obliged to take under it, he could only give it up so far as it was in him; and still he did so under an express qualification, of resuming the estate in certain circumstances. This reservation, though it serves to show the intentions of the parties, is not material. Even without it, the deed would not have inferred an irritancy; and his descendants could have challenged Mr Hamilton's possession. Now, Mr Hamilton is dead, without heirs of his body; Sir Hew is also dead; and the events have occurred which the deed of repudiation had in view. I see nothing, therefore, to prevent the succession from now opening to his descendants.

I shall not enter into the other points which have been debated. In some things I agree with what has been said, in others I differ. As no irritancy has been incurred, it is unnecessary to say any thing of the defender's right to purge it. It has at any rate been already purged, if it ever existed. As to the competency of an action after Sir Hew's death, I should hesitate in considering that event as an absolute bar to a challenge. Contraventions may be committed, perhaps in the last moments of existence, which can only be obviated by a declarator of irritancy after the contravener's death.

But my opinion does not rest on any of these grounds. It is founded on this, That Sir Hew Dalrymple was not in a condition to irritate, and that what he did, he had a right to do without injury to himself or his descendants.

LORD CRAIG.—After so much has been said, I shall not go into any detail of the merits of the cause. The question formerly be-

fore us was, Whether the pursuer, assuming the character of a first substitute, was excluded by the production of a prescriptive title? Upon the hypothetical case then argued, I thought her minority ought to be deducted. Now the case comes before us in a different shape; we are not to take her alleged character for granted, but are to enquire whether she is entitled to that character. My opinion is, that she has failed in shewing that such was her character.

1st, Sir Hew Dalrymple was not in a character in which he could possibly contravene. There was no clause in the entail to force him to enter; he did not enter; and his possession was merely an apparenacy.

2d, Independently of that consideration, an action of declarator of irritancy cannot now proceed, because it was not brought against the contravener himself. Much has been said concerning the penal nature of irritancies. When it is declared that a man shall *amit, lose* and *fine* his right, it is certainly, in common sense, a forfeiture, especially when it is to affect not only himself, but his innocent descendants.

3dly, I fully concur in what has been stated (by Lord Armadale), that if an irritancy has been incurred, it has purged itself, as, by the hand of time, the succession has again come into its proper course.

LORD CULLEN.—I agree in the opinion delivered by Lord Eskgrove. I concurred in the former interlocutor, but my opinion did not go on the ground of the pursuer being a first substitute. I thought that every substitute was entitled to deduct his own minority. On that ground, I should still be of opinion, that the defender had produced no title sufficient to exclude. But there are other grounds which would render such a decision of no advantage to the pursuer.

1st, I think Sir Hew Dalrymple was not in a situation to incur an irritancy; and,

2d, That no irritancy was actually incurred.

On the other points which have been argued I am not equally clear; but their decision is here unnecessary.

LORD DUNSINNAN.—I have given much attention to all the questions which have been here argued: but it is not necessary to decide them all. Now that the case is fully before the Court, I am of opinion, That in the situation in which Sir Hew Dalrymple stood, he could not incur an irritancy, and that he did nothing which could have inferred one. No effectual action could have been brought against him even in his own lifetime, much less now that he is dead. As I am of opinion that the minority of a remote substitute cannot be deducted, and as, on the supposition of an irritancy having been incurred, Mrs Fullarton is still a remote substitute, I think that her plea of minority cannot be allowed. On the other points formerly argued in this cause, I continue of the same opinion; but they are now immaterial to the issue.

LORD METHVEN.—I coincide in opinion with what has been delivered by the greater number of your Lordships. Formerly I dissented from the majority in the question of prescription. I do not

think that the minority of even the nearest substitute is to be deducted. Still less can I admit the principle now pleaded for Mrs Fullarton, that each heir is entitled to deduct from the years of prescription those of his own minority. It appears to me inconsistent with the principles of our law, that the positive prescription should run against one substitute, and not against another; yet this consequence would unavoidably follow from admitting the principle contended for.

By the remit of the House of Lords, we are now called upon to say, Whether Mrs Fullarton is in fact the nearest substitute? I think she is not; for, in order to make way for that supposition, it must be held, that not only Sir Hew Dalrymple, but also Mr Hamilton, had been previously forfeited, and might have been deprived of the property; yet in the whole of the pursuer's memorial, not a word will be found to prove that Mr Hamilton had incurred an irritancy; and if he had, unquestionably he at least could have purged the irritancy, by laying down the estate in one capacity, and taking it up in another. But I do not think that Sir Hew ever contravened. On that head I agree to what has been said by most of my brethren.

LORD GLENLEE.—I was decidedly of opinion, with a few of your Lordships number, against the former interlocutor in this cause. I held, that the minority of no substitute whatever could be deducted in a case of positive prescription; and I am still, with great confidence, of the same opinion.

I now think, that, independently of prescription, nothing has been done which could have enabled Mrs Fullarton to evict the estate.—The deed of repudiation was a mere *non repugnantia*, and could not infer an irritancy, unless your Lordships should be disposed to carry the matter so very far as to hold, with the pursuer in some parts of her pleadings, that mere *non repugnantia*, such as not defending an action, may amount to a contravention. On that ground, it might be argued against the pursuer herself, that her father had incurred such an irritancy of connivance, in not bringing an action in proper time against the late Sir Hew Dalrymple.

I also concur in the opinion given by some of your Lordships, that wherever an irritancy can be purged, an opportunity must be given for doing so.

LORD POLKEMMET.—As, from particular circumstances, I have not had an opportunity of perusing the papers with sufficient attention, I do not mean to give a vote in this cause. I continue of opinion as before, that the minority of the nearest substitute may be pleaded against prescription. As to the particular circumstances of the case, I think that Sir Hew Dalrymple was capable of contravening without entering as heir of entail. His intention plainly was to hold both estates, in contravention of the will of the entailor. His grandfather's plan, if he had followed it out, would have been a clear contravention. The plan which he actually adopted, by the advice, it is said, of Mr Craigie, (afterwards Lord President), was nothing more than a palpable cover for defeating the will of the entailor.

LORD PRESIDENT.—To understand the former judgments, as well as the present shape of the cause, we ought to consider how the question stood when it first came into Court, and what variation it has since undergone.

Mrs Fullarton brought her action for the purpose of setting aside the titles in the person of John Hamilton of Bargany, then in life, and likewise all right and title which might be claimed by Sir Hew Dalrymple, or his family, to the estate of Bargany, on account of certain alleged acts of contravention of the entail, and for having it found and declared, that the estate did now belong to the pursuer, Mrs Fullarton, who should be at liberty to make up titles to it by service or otherwise.

Mr Hamilton produced his charter and seisin in 1742, which, with more than forty years acknowledged possession, he insisted upon as an *exclusive title*, or, in other words, a special plea in bar of the action.

This is a species of defence well understood in our practice, founded on the direct enactment of a most important statute, viz. the act 1617, cap. 12, and which ought to have been better explained in the House of Lords, where we are told it was looked upon as an extraordinary thing, that when parties were ready to argue the merits of a cause, the Court should have allowed them to go away from the merits into a *collateral point*. I will take it upon me to say, that this form, so long established *with us*, of admitting an *exclusive plea*, founded upon the act 1617, is a most essential one to the land-rights of Scotland, highly expedient, so far as it abridges litigation, and to which no objection can lie in point of justice.

The answer made by Mrs Fullarton, and the only one that could possibly be suggested, was her *minority* during a part of the time; which minority she pleaded under the construction of a clause in that very statute. Her counsel admitted that there was a difficulty in applying that doctrine to the case of substitute heirs in a Scots entail, on account of certain decisions, in the cases of Mackerston, &c. But by way of answer to this difficulty, they resorted to a *distinction*, which, for the first time, was heard of in this cause, viz. between one substitute heir and another; and a majority of the Court thought, that if Mrs Fullarton could put herself into the situation of being *next* in succession to Mr Hamilton, the person actually in the fee, she might avail herself of her minority. Others of the Judges were clear that this could make no difference upon the question, that the decisions had made no such distinction, and that the principle was the same as to all. Such of us as were of this last opinion had no occasion to call upon Mrs Fullarton to make out that she was truly what she described herself to be, i.e. the next substitute to Mr Hamilton, and therefore in delivering our opinions we assumed nothing either in law or fact. But it must be confessed, that the interlocutor, which proceeded on the opinion given by the majority of the Court, did assume what required to be proved, viz. that the pursuer was the next substitute heir to Mr Hamilton in fact, or in construction of law; whereas *upon the face of the charter*, as well as of the original deed of entail, she certainly was not so, all the family of the late Sir Hew Dalrymple standing before her. The cause, therefore, went to the House of Lords in rather a perplexed situation, and I am not surprised that it has come back to us again.

Since the cause returned, I believe all or most of the writings called for have been produced, and the counsel on both sides have gone largely into the cause, in order that they may have the benefit of our opinion upon the whole merits, although it is said that the preliminary defence is not yet meant to be waived.

I shall therefore now take a view of the cause under two distinct heads; 1st, The exclusive plea; 2^d, The merits of the competition, as arising upon the whole matter now pleaded.

As to the *first*, having formerly delivered my opinion at full length, which I observe has been put into print, I shall not resume what is there said, but shall only trouble the Court with a few additional suggestions.

In the case of a fee-simple estate the rule is plain and easy. If the person to whom the right of fee does truly and of right belong, and from whom it is unduly withheld, happens to be under age, the years of his minority are to be discounted; and when he dies, if the next heir to him is also under age, there will be another deduction for this person's minority subsequent to his succession, and so on.—It is obvious that these successive minorities may keep open the prescription for a very considerable period of time. It cannot be limited to forty or to sixty years, or any other precise period. In the case of Wilson against Campbell, the action was brought at the distance of more than a century; and proofs were adduced of *successive* minorities of the pursuer's ancestors, one after another, in order if possible to bring the period of possession, free of minority, within forty years. But if once a possession, free of minority, has taken place for forty years, at any period, without challenge, or joining of different periods together, it is no matter what minority may have taken place before or after, or during the intervals of that time; and the pursuer cannot avail himself of his own minority, to open up a prescription which has otherwise been completed, any more than he can plead upon the minority of the first, or any particular heir, if, independent thereof, the prescription has taken place by forty years possession against majors.

The case of an entailed estate is, *in this respect*, no way different. Thus, if we suppose that the estate of Bargany had been taken up by some person who had no right to it under the entail, and that the true owner, who was unjustly excluded, lived forty years after that period, during twenty years of which he was under age, and that the next heir succeeding to this person lived twenty years longer, during ten of which he was under age, and was then succeeded by a person just born, who delayed his challenge till he attained thirty years of age, the action would still come in sufficient time in the nineteenth year after the first period of eviction; because, deducting the years of the three successive minorities, there would remain only thirty-nine years of clear possession available for prescription; but if the challenge was delayed one full year more, prescription would operate.

So far the matter is clear; but the present case is entirely of a different nature, and the pursuer founds her plea of minority upon quite a different medium, namely, the *personal jus crediti*, which, by the nature of a Scots entail, is understood to belong to every heir called in the line of destination, whether the right of fee may have opened to one person or to another.

Mrs Fullarton, who pleads upon her own minority, cannot say that the right of succession to the fee ever opened to her by death, or by declarator, or in any manner of way. If she could say this, the rents would belong to her from the time that the succession thus opened, and her minority from that time would interrupt. But she has never yet got that length; all that she can possibly say is, that she, in common with all the other expectant heirs of entail, had a personal *jus crediti*, or right of challenge upon the contravention of prior owners, which, if prosecuted with effect, might have placed some person (perhaps herself) in the situation of heir *apparent* in the fee, *i. e.* heir to whom the fee *had actually opened*; for in this sense alone the word *apparency* is used in the law of Scotland. She maintains, that this right of challenge belonging to her is saved from prescription, not by the minority of any of her predecessors, though her father, who stood nearer, and had equally the right of challenge, was under age for a part of the time, but by her *own minority*, which she pleads, not during the whole period of it, but during the period that she stood *next*, as she alleges, to the late Mr Hamilton, after her father's death; Mr Hamilton having no issue, and Sir Hew Dalrymple and his family being, according to her hypothesis, out of the question by their supposed acts of contravention, though no declarator of irritancy ever was sued.

Many things are here taken for granted which remain to be proved; and after all, the rule which she contends for, of deducting *her own minority alone*, in order to preserve a right to herself, which she admits to be lost as to the other substitutes, would be of so anomalous a nature, that hitherto there has been no example of it in the law of Scotland. In order to make it apply, we must suppose that it never can belong but to one person out of perhaps a hundred, who are equally heirs of entail, *viz.* the person who has been so lucky as not only to be under age during a part of the time, but also to have been in the place of *nearest substitute*, and, moreover, to be now the pursuer of the action; for, without a concurrence of all these different requisites, the minority seems, according to the argument, not to be pleadable, and no other minority can be pleaded; and if that person should happen to die, although succeeded by an infant, yet the right is lost if the forty years be elapsed. Thus, if Mrs Fullarton were out of the question, it seems to be admitted, that her younger sister could neither plead her own minority, as she did not succeed to be the nearest substitute till after the forty years, nor the minority of any of her predecessors.

There must be some defect in a rule of law, which is so inadequate and so contrary to every other rule or principle which can be discovered upon this subject. Accordingly, one of my brethren, who formerly agreed to the pursuer's argument, has this day, in a great measure, though not entirely, given it up, by saying that it is not the person *next in succession* whose minority ought to be deducted, but the person who happens to be the *pursuer* of the action, to whom he says, in the language of the statute, the prescription is *objected*. This is entirely a new modification of the argument, different from any thing that has ever been suggested before, either within or without the bar; and it appears, with submission, to be founded upon a mistaken view of the statute, the words of which are, "that the years " of minority are not to be *counted*, but only the years during which

“the parties against whom the prescription is used and objected, were ‘majoris.’” This does not mean the pursuer of the action, as is clear from the case above noticed of a fee-simple estate, but the person or party against whom the prescription is *running* at the time of its currency. The action may be brought at the distance of a century, and it is no matter that the pursuer of it has been under age during a part of that time, or whether he be now of age or not, if the prescription has taken place against others *who stood before him in the title to the estate*. What I mean, is the *positive* prescription, which alone we have occasion to speak of here; and I have all along taken it for granted, that minority is a deduction from the positive prescription; though this is a point which, were it entire, would admit of great doubt.

It has again and again been explained, that the personal *jus crediti* or *jus agendi*, which entitles every individual interested in the preservation of an entailed estate, to maintain actions for purging contravention, is entirely of a different nature from the right of fee, which last can never belong but to one person at a time, viz. the person to whom such right has opened by succession or otherwise, and to whom the rents of the estate do truly belong, in so much that they pass to his executors and nearest in kin, although he should happen to die without making up any formal title by service; and it is not disputed that the minority of this person will interrupt.

But the personal *jus crediti*, which, by the law of Scotland, is a mere faculty, see 29th January 1789, Wedderburn against Colville, does not carry along with it one particle of the fee, belongs, from the outset, equally without distinction, to all and every one of the heirs in the line of succession, whether remote or near; and if we allow minority here to be a deduction, we have no choice but to admit it as to every one of them, no matter in what place he stands, and either to allow the minority of any one to be available to the whole, or to reject it altogether.

It is said, that each of them has a distinct right of action, and that they cannot be compared to a body corporate, and that it is a mistake to consider the right as of an *indivisible* nature.

That heirs of entail are not a body corporate, may be admitted: No such idea ever was entertained; but the *jus crediti*, which belongs to the substitute heirs, by the nature of a Scots entail, is nevertheless a right which cannot be divided *into parts*, but belongs whole and entire to all and each of them. It is not like an estate falling to heirs-portioners, which is divisible, or a right of commonry which each man may acquire and lose for his own share. It must either be *wholly* preserved or *wholly* cut off, because it cannot be parcelled out into halves, or thirds, or any number of parts, among a variety of different persons. No instance can be found of such a right being *partially* saved or *partially* lost. If any one of the heirs brings his challenge within the years of prescription, he will save the estate to the *whole*. If no such action is brought, it will be lost to the whole; and in no case of that kind was it ever thought, that the minority of one or more of the individuals would have an effect, *e.g.* in cases of nuisance. If it could, there would be no such thing as applying prescription, either positive or negative, to such a case.

It is said, That, by the rule which the pursuer contends for, the prescription will never exceed sixty-one years. It is very true, that,

giving up one-half, or more, of the plea formerly maintained in the cases of Mackerston, &c. the term of prescription has, in the present argument, been limited and confined in that manner; but this is introducing a new and an arbitrary rule, founded upon no principle whatever, and calculated merely to serve the purpose of the present question. It is giving up the *jus crediti* altogether as the foundation of it, and substituting another ground, viz. That of the succession having actually opened, although, in fact, no such opening has ever been either acknowledged or proved; and even if it had, the proposition must be wrong, as it limits the right of deducting minority within narrower bounds than would take place in a fee-simple estate. This is giving up the main point, and it also supposes that irritancies operate *ipso jure*, the contrary of which is true. It would be much more rational to say, that the minority of every substitute coming successively to be the nearest should be deducted, whoever is the pursuer of the action, *e. g.* Suppose, in the present case, Mrs Fullarton had been prevailed upon not to bring any action at all, but that her grand-aunt, Mrs Duff, had brought it, in order to preserve the succession, and bring it a step nearer to her, why should she not be allowed to plead Mrs Fullarton's minority, if the minority of any substitute at all can be pleaded in such a case?

But, after all that has been said, although I continue of opinion that the plea of exclusion, stated in defence for Mr Hamilton in the outset of this cause, was an important one, and ought to have been sustained in order to cut short the litigation, I am far from being clear that it is of the same consequence now since Mr Hamilton's death. The question of prescription upon the charter 1742 is still no doubt a point to be attended to in the cause; but Mr Hamilton being dead, the exclusive title is no longer of importance to him, and the shape of the question, so far as the present parties are concerned, comes in effect rather to this, who is entitled to succeed Mr Hamilton in the estate of Bargany? whether is it the pursuer, Mrs Fullarton, or is it the present Sir Hew Dalrymple, who stands before Mrs Fullarton in the line of succession pointed out by the entail, and by the charter? Whoever the person be who is now entitled to the succession, I am clear that the estate must be taken up by that person in the form of a service to Mr Hamilton; for Mr Hamilton's right as fiar of the estate while he lived, can never now be vacated, as no irritancy to the effect of forfeiture can be allowed to take place against him after his death; and besides, his service as heir in the entailed estate, if originally questionable, became secured and validated by the act 1617, chap. 15, establishing the vicennial prescription of retours. The person, therefore, who now takes the estate, cannot pass him by, but must make up titles by service as heir of tailzie to Mr Hamilton.

The pursuer being sensible of this, and that she cannot prevail in obtaining declarator of irritancy against Mr Hamilton after his death, has not so much as transferred the action against his heirs, which, in point of form, would otherwise have been necessary: And this brings me to the second head, viz. To consider the cause upon its merits, independent of the exclusive plea stated as a preliminary defence.

A great deal has been said from the bar about Mr Hamilton's having committed an act of contravention, by taking the estate under

his brother, the late Sir Hew's deed of repudiation. But it is a mistake to consider this as an act of contravention. He could not force his brother to take the succession; and so far from doing any thing wrong, he strictly complied with the entail, by serving heir under it upon the narrative of his brother's deed of repudiation, and passing a charter in the literal terms of the entail, and taking the name and arms of Hamilton of Bargany.

Neither is it thought that he was guilty of contravention when he executed the disposition 1780, which was meant for the purpose of carrying the entail itself into effect, as appears from the narrative. He went upon the supposition, that Sir Hew and his family were not forfeited of their right merely because they had waved it for a time; and supposing him to have been mistaken in this, the Court would have allowed him to purify the contravention, by recalling that deed, if necessary. But it seems to have been thought proper to execute this deed, in order to prevent any argument of the positive prescription taking place against Sir Hew and his family upon the charter 1742, in respect that they were not therein called by name.

It is material to observe, in the *first place*, That nothing contained in the tailzie of Bargany could ever have been pleaded as a bar to the late Sir Hew Dalrymple's taking both estates, and assuming the names and arms of both families. The obstacle which occurred did not arise from the entail of Bargany, but from that of a different estate, viz. North Berwick.

2dly, Nothing contained in the entail of North Berwick, except the devolving clause, could ever have been pleaded as a bar to holding both estates, which devolving clause could not have been laid hold of by Mrs Fullarton, or any other heir in the Bargany estate, but could only have been founded on by the heirs in the North Berwick estate. But the effect of it is now entirely at an end by prescription, both positive and negative, Mrs Fullarton's minority having nothing to do with that question. The late Sir Hew made up titles to North Berwick, by special service to his father, Sir Robert, and infeftment in November 1734, leaving out the devolving clause, which he did by permission of his grandfather, the maker of that entail, and continued to possess more than forty years upon that title, without challenge or interruption of any kind; for, although some other deeds of a contradictory nature were executed by his grandfather, President Dalrymple, in 1736, these remained latent and personal, and are now also gone by prescription, having never been made the title of possession. Sir Hew refused to comply with the last of these deeds, which was *ultra vires* of the maker, as it went beyond the powers reserved to him in his son's marriage settlement, if the meaning of it was to denude Sir Hew without any salvo, or clause of return, in case his family should come to be the only heirs-male of the marriage; which has since happened. This was strongly and explicitly provided for in the marriage-settlement, and no power was left to the President to make the condition of his son's family worse, by undoing so important a stipulation. Indeed it is probable, from a clause in his deed, 9th April 1736, page 38 of appendix, that he did not mean any such thing.

3dly, Although Sir Hew, in order to avoid a question with his brother John, upon this deed 9th April, agreed to waive taking the estate of Bargany, in order that his brother might make up a title to

it as heir of entail; this was cautiously done, under the express quality of reserving his own and his family's right of succeeding again to it, whenever they could with safety and propriety hold both estates: and John was satisfied to take it upon these terms, and not to pursue any declarator of irritancy against Sir Hew for not taking the name and arms, which, had he done, it might have been still in Sir Hew's power to re-assume the name and arms, and so to purge the irritancy *quoad* that estate, though still he might have been unable, on account of the deeds relative to the other estate, to hold possession of both.

4thly, Sir Hew having died without any declarator having been obtained, or even raised against him, all question about forfeiting him and his descendants came to be at an end; not that I think he was incapable, as an apparent heir, of incurring an irritancy, but because, in fact, he never was forfeited. Irritancies have often been allowed to be purged, even by the contravener himself, where the act of contravention is of a harmless nature, such as not taking the name and arms; or where the effect of it is done away, such as by redeeming an adjudication, especially where the enforcing it would be rigorous and penal, as in the case of descendants being included in the irritancy. But it would be still stronger to inflict such forfeiture after the death of the contravener, when his heirs have done no wrong: no instance of this is to be found. None of the cases referred to by the pursuer are to the point. In the case of Gordon of Carleton, the heir of the contravener is in possession to this day. A declarator of irritancy may be pursued after death, to the effect of annulling the acts of contravention, but not to the effect of forfeiting, although, *pro forma*, both clauses must be founded on.

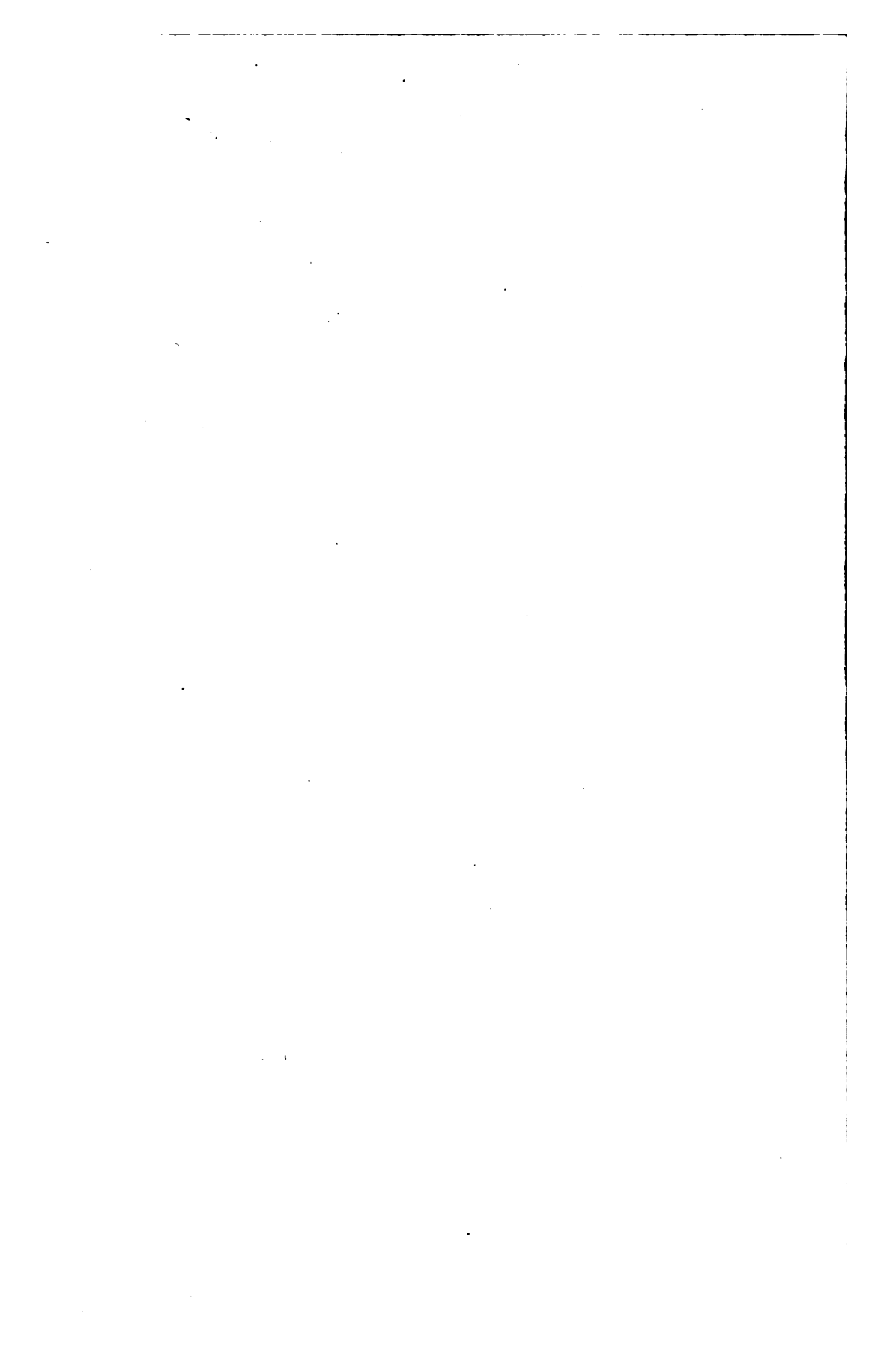
It is said to be no more than a quality of the right, and giving effect to the destination of the entail. But this is not a good answer. It is enough that a man is at liberty to chuse his heir and to lay him under the ordinary fetters of an entail;—even these are considered as unfavourable and strictly interpreted; but any hard conditions or forfeiting clauses are still more so.

5thly, The present defender holds the estates in a manner perfectly consistent with both entails—for even the devolving clause is now in his favour; and in these circumstances, how can any irritancy be declared against him? The present question relates to Bargany alone, and supposing an irritancy had been declared against his father as matters *then* stood, the question would still have remained, Whether, in the present state of matters, he would not have been entitled, under both entails, to hold both estates? As to North Berwick, it is clear that he would, under the clause of return, which his grandfather could not dispense with. As to Bargany, it often happens, that a remoter heir is served, because a nearer is not in existence at the time; but afterwards, upon his existence, the nearer is entitled to call on the remoter to denude. In particular circumstances, this has been a subject of controversy. See case of Mackinnon against Macdonald in 1766; but generally it is provided for by special clauses; and in the case of North Berwick it is provided for. But it is enough to say, that there never was any forfeiture here, and therefore no room for trying the question. The repudiation of the one brother, and service of the other, being *qualified*, this amounted to an agreement between them to that effect, to which

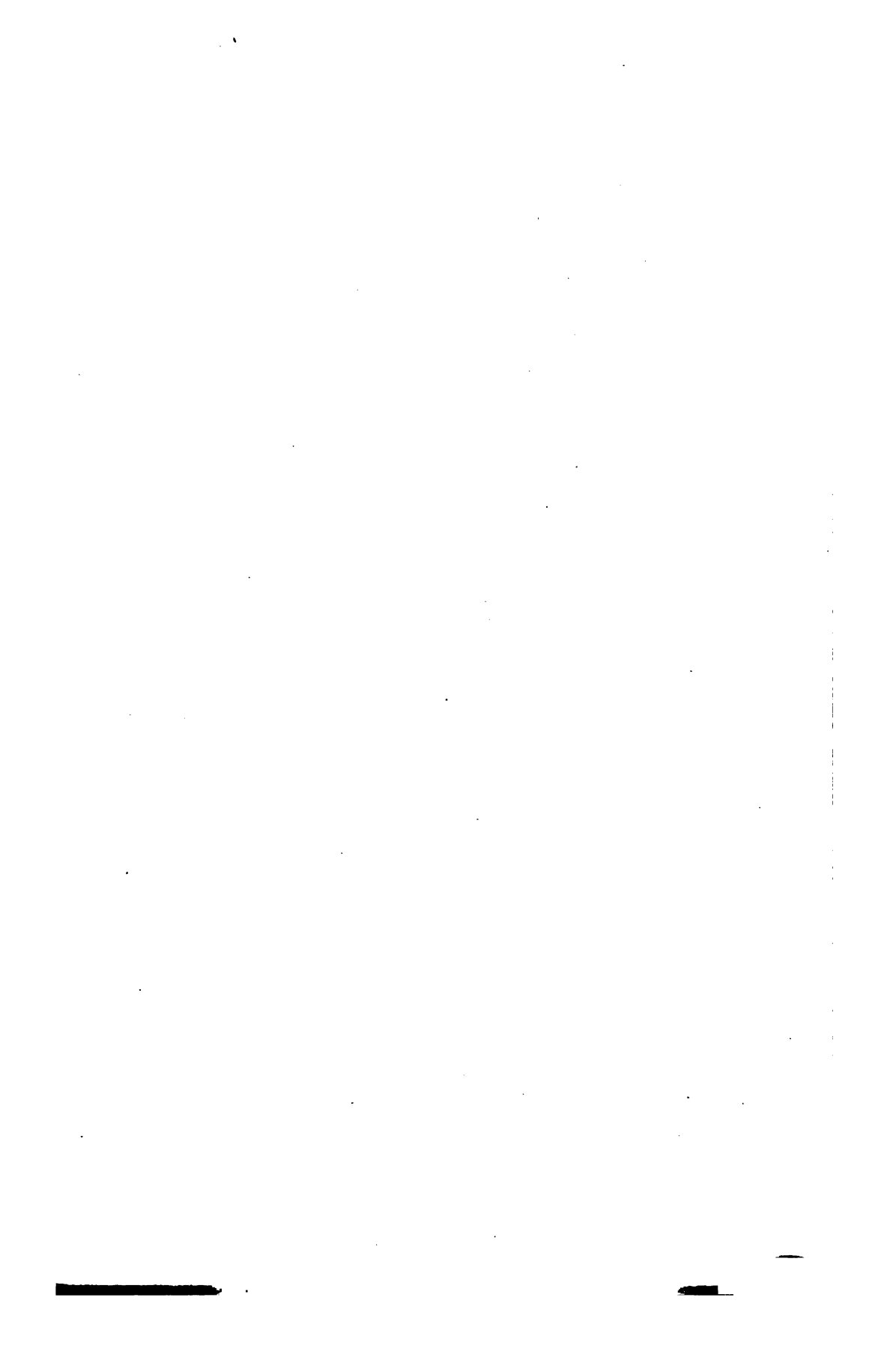
no good objection could lie, because it was agreeable to the real intention and spirit of both entails.

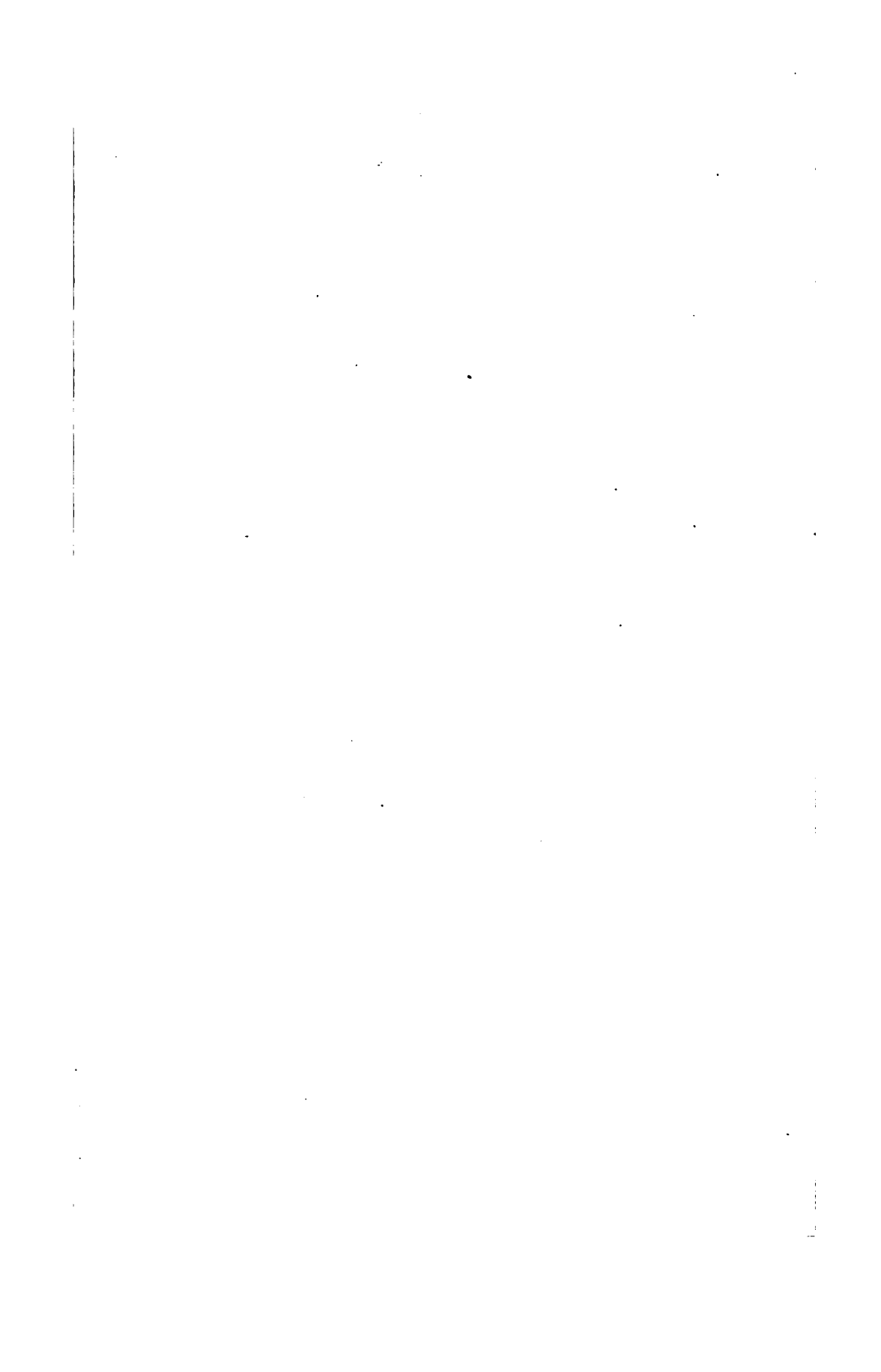
The methods followed were well devised to answer the views of all parties concerned at the time, and to give a proper effect to both entails. Mrs Fullarton therefore is truly not the next heir, and has no title in any point of view.

THE END.



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